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REPORTS OF CASES

324

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1892.

VOLUME XXXV.

D. A. CAMPBELL,

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In behalf of the people of Nebraska.

Rec. Nov. 3, 1893

THE SUPREME COURT

OF

NEBRASKA.

1892.

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| J. R. THOMPSON..... | Grand Island. |
| <i>Twelfth District—</i> | |
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The syllabus in each case was prepared by the judge writing the opinion, in accordance with rule 20.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1892.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.

HON. T. L. NORVAL, } JUDGES.
HON. A. M. POST, }

**EDGAR A. BOURNE ET AL. V. STATE, EX REL. JOHN W.
TAYLOR.**

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[FILED JUNE 11, 1892.]

1. **Schools: REGULATIONS: THE BOARD OF TRUSTEES** of a high school has power to adopt and enforce appropriate and reasonable rules and regulations for the government and management of the schools under its control.
2. ———: ———: **REPORTS TO BE SIGNED BY PARENTS.** A rule which makes it the duty of a teacher to keep a record of the standing of each pupil in the studies pursued by him, of his attendance and deportment, to send each month by the pupil a written report of the same to his parent or guardian, and which requires such parent or guardian to sign and return the same to the teacher, is a reasonable one.

ERROR to the district court for Nemaha county. Tried below before **BROADY, J.**

Bourne v. State, ex rel. Taylor.

E. W. Thomas, and *E. A. Bourne*, for plaintiffs in error :

Whether a rule or regulation of the school authorities is reasonable or valid is a question of law for the court. (*Fertich v. Michener*, 111 Ind., 472; *State v. Vanderbilt*, 18 N. E. Rep. [Ind.], 366.) The rule in the case at bar is reasonable and proper. (*King v. Sch. Board*, 71 Mo., 629; *Burdick v. Babcock*, 31 Ia., 562; *Abel v. Clark*, 24 Pac. Rep. [Cal.], 383; *Deskins v. Gore*, 85 Mo., 485.

W. H. Kelligar, and *G. W. Cornell*, contra :

Regulations by a school board will be set aside by the courts whenever found to be unreasonable, or not in accordance with the general law of the state. (*State v. School Dist.*, 31 Neb., 552; *State v. White*, 82 Ind., 278; *Morrow v. Wood*, 35 Wis., 59; *Trustees v. Van Allen*, 87 Ill., 303.) The rule is void, first, because it does not concern the imparting of knowledge, and, second, because, as applied in this case, it is a violation of the written law of this state. (*State v. Bd. of Education*, 63 Wis., 234; *State v. Sch. Dist.*, 31 Neb., 552; *Perkins v. Board*, 9 N. W. Rep. [Ia.], 356; *Holman v. Trustees*, 43 N. W. Rep. [Mich.], 997.)

NORVAL, J.

This was a proceeding by *mandamus* brought in the district court to compel the board of trustees of school district No. 36 of Nemaha county to reinstate Guy R. Taylor, the relator's son, as a pupil in the public schools. Issues were formed and the cause was tried in vacation before the Hon. J. H. Broady, one of the judges of the district court of that county, who granted a peremptory writ of *mandamus* as prayed.

The facts are these: Nemaha City constitutes school district No. 36 of Nemaha county and is governed by a board of trustees consisting of six members. The relator is a resident and a taxpayer of said district. His son, Guy

R., is about twelve years of age, and for some time prior to the 9th day of March, 1891, was a pupil in regular attendance and in good standing in the public schools of said district. One Thomas J. Williamson is, and has been for some time, the principal of said school. The school board had adopted rules for the government of the public schools which relator's child was attending, and the principal was charged with the enforcement of the same. One of these rules, which had been continuously enforced since September, 1890, was to the effect that the teacher keep a record showing the attendance, deportment, and standing in scholarship of each pupil, and that at the end of each month the teacher should make from such record a report card for each pupil showing his punctuality, deportment, and scholarship for the month, and send the same by such pupil to his parent or guardian. The rule further required each pupil, within eight days, to return to the teacher this report card signed by his parent or guardian, and in case of failure to so return the same, duly signed, the pupil was to be sent home to get it signed. Of the existence of this rule relator and his child had been duly informed, and each month from September, 1890, to February of the following year the principal of the schools and made out and delivered a report card to relator's son as required by the rules and regulations of the board of trustees, which was regularly returned duly signed by the relator. In February, 1891, the monthly report card of said Guy R. Taylor was made out and sent to relator in the usual manner, which relator refused to sign, and the same was returned to the principal unsigned. Thereupon Mr. Williamson sent Guy home for the purpose of obtaining his father's signature, who, on returning to school, reported that neither his father nor mother would sign the same, and he was again sent home with the same result. The matter was brought before the school board at their next regular meeting, and the principal was directed to enforce the rule. While no order or

Bourne v. State, ex rel. Taylor.

resolution has been passed by the school board either suspending or expelling relator's son from the schools, yet the enforcement of the rule above referred to has had the effect of excluding him from the school until the monthly report card is signed and returned. This, to all intents and purposes, amounts to a suspension.

The school district of which respondents are trustees was organized under subdivision 6 of chapter 79, Compiled Statutes, entitled "Schools." Section 3 of said subdivision provides that "Said trustees shall have power to classify and grade the scholars in such district, and cause them to be taught in such schools and departments as they may deem expedient; to establish in such district a high school when ordered by a vote of the district at any annual meeting, and to determine the qualifications for admission to such schools, and the price to be paid for tuition on any branch therein; to employ all teachers necessary for the several schools of said district; to prescribe courses of study and text-books for the use of said schools, and to make such rules and regulations as they may think needful for the government of the schools, and for the preservation of the property of the district, and also to determine the rate of tuition to be paid by non-resident pupils attending any school in said district." By this section, and the incidental powers possessed by school boards, the board of trustees of a school district has the power to adopt and enforce suitable rules and regulations for the discipline, government, and management of the schools under its control, but the rules must be reasonable and just. The authority thus conferred carries with it the power to enforce such rules, when absolutely necessary, by the suspension or expulsion from the school of any pupil who has persistently non-complied with the same. This is practically conceded by counsel for relator, but it is contended that the rule in question, under which relator's son was excluded from the school, is unreasonable, because it does not relate to a sub-

ject which concerns the education of the pupil or the discipline of the school, therefore the respondents had no authority to adopt or enforce the same. In this view we are unable to concur. It will be noticed that this statute expressly confers upon the trustees the power to classify and grade the scholars. To do this successfully it is important for them to know the progress made by each pupil. There is probably no better manner of determining the proficiency of the students in their studies than by a correct system of marking by the teachers on their daily recitations. This, when conscientiously done, materially aids in the proper classification of the pupils. Some system of marking the standing and proficiency of the pupils is generally adopted by all graded schools. It tends to stimulate the pupils to higher scholarship. That the respondents had the power to require the teacher to keep a record showing the standing and proficiency of each scholar in the branches taught, as well as his attendance and punctuality, cannot be doubted, and we think a rule is not unreasonable or harsh which makes it the duty of the teacher to send each month by each pupil a written report of his standing to his parent or guardian for examination, and to require that the same be returned to the teacher with the signature of the parent or guardian. By this method the parent is not only informed of the standing of his child, but the regularity of his attendance. The relator has frequently recognized the reasonableness of this rule by repeatedly signing and returning to the teacher the report cards. No valid excuse has been offered for not signing the last one sent him. The objection made at the time for so doing was that his son's standing was not so good as it had been during the months preceding. His excuse did not justify him in refusing to comply with a rule prescribed by the board.

An examination of authorities cited in relator's brief will show that they do not sustain the position for which he contends.

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State v. Board of Education, 63 Wis., 234, was a case where a pupil was suspended for refusing to comply with a regulation of the school, to the effect that each scholar, when returning to school after recess, should bring a stick of wood for the fire. It was decided that the regulation was invalid and that a pupil cannot be suspended for failing to comply therewith.

In *Holman v. School Trustees*, 43 N. W. Rep. [Mich.], 997, it was held that a rule adopted by the school board which authorized the suspension of a pupil from school for failure to pay for or replace a window-pane broken by him, was without authority and void. To the same effect is *Perkins v. School District*, 9 N. W. Rep. [Ia.], 356.

In *State v. School District*, 31 Neb., 552, it was held that while the school trustees of a high school have the power to prescribe what branches shall be taught and what text-book shall be used, the parent has the right to decide what particular branch of studies of those prescribed to be taught shall be pursued by his child, and, if the selection is reasonable, it must be respected by the board.

It is obvious that none of these decisions meet the question now before us. It is clear that the relator is not entitled to the relief demanded. The judgment is reversed and the action

DISMISSED.

THE other judges concur.

CLEMENS OSKAMP ET AL. V. JAMES GADSDEN.

[FILED JUNE 11, 1892.]

Evidence: CONTRACT BY TELEPHONE: MESSAGE REPEATED BY OPERATOR. Defendant called at the public telephone station at Schuyler and asked the operator to request plaintiffs to step to the telephone in their place of business in Omaha as he desired to converse with them. H., one of the plaintiffs, answered the call, but owing to the conditions of the atmosphere the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station, proposed to and did transmit defendant's message to plaintiff offering to sell them a quantity of hay, and he also repeated to the defendant their answer accepting the proposition. In an action for a breach of the contract it was *held*, that the conversation was admissible in evidence, and that it was competent for the defendant to state the contents of plaintiffs' answer to his message as repeated by the operator at Fremont at the time it came over the wire.

ERROR to the district court for Douglas county. Tried below before CLARKSON, J.

Isaac Adams, for plaintiffs in error:

Gadsden's testimony is irrelevant, and hearsay or derivative. (Stevens, Dig. of Ev., art. 62.) To hold Gadsden's testimony competent is contrary to public policy, for the following reasons:

(a.) Since it was repetition of the language of another, that language might not have been correctly repeated, either through original misapprehension, subsequent failure of memory, or willful misrepresentation.

(b.) The statements testified to were made by a person who was neither under the obligations of an oath, nor subject to cross-examination respecting accuracy or veracity.

(c.) It would be to introduce a new and distinct excep-

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tion to the doctrine excluding hearsay evidence from judicial investigations, and one based upon a different foundation from the established exceptions to this doctrine. The operator at Fremont was not the plaintiff's agent. The principle to be applied here is the same as in case of a message transmitted by telegraph, where the original, as against the sender, and the one by which the sender is bound, is the message as received. (*Ayer v. W. U. Tel. Co.*, 79 Me., 493; *Tel. Co. v. Shotter*, 71 Ga., 760; *Durkee v. R. Co.*, 29 Vt., 137; *Saveland v. Green*, 40 Wis., 431; *Morgan v. People*, 59 Ill., 58; *Howley v. Whipple*, 48 N. H., 488.) The ruling now complained of goes farther than *Sullivan v. Kuykendall*, 82 Ky., 483, in that it permits testimony of what Gadsden said to the operator when Gadsden was not in a situation to know whether the operator repeated his message as given or not.

Richmond & Legge, contra:

The testimony of Gadsden is the best evidence, and is admissible on the grounds of agency. There are stronger reasons for holding the operator at Fremont the agent of both parties than in the case of *Sullivan v. Kuykendall*, 82 Ky., 483, for in that case the operator was at the station at one end of the line, and in the case at bar the operator repeating the message was at an intermediate point and acted as interpreter for both parties. Viewing the operator at Fremont as the agent of defendant Gadsden, it is clear that she was his agent to repeat to plaintiff only the message which he delivered to her, and that he would not be bound by any message which she, as the employe of the telephone company, saw fit to deliver. (Gray, *Telegraphs*, sec. 105.)

NORVAL, J.

Plaintiffs in error brought suit in the court below to recover damages for the alleged breach of contract by the de-

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defendant in his refusing to deliver a quantity of hay claimed to have been purchased by them from him. The jury returned a verdict for defendant, upon which judgment was entered.

In 1888 plaintiffs were engaged in the city of Omaha in the flour, feed, grain, and hay business. Defendant resided at Schuyler, and had about 150 tons of baled hay which he desired to sell. Prior to the middle of April of that year plaintiffs and defendant had some correspondence about the purchase and sale of this hay, but no contract was entered into at that time. On May 1, 1888, defendant sent the following letter to plaintiffs:

“Oakamp, Haines & Co., Omaha, Neb.—GENTLEMEN: What is your price for pressed hay now? Mine is still for sale if I can get as much as others are getting. I would rather close out the entire amount at once if I can find a customer, and will give the use of my barn till July 14th if buyer wants to speculate. There is scarcely any hay left here. Some on the prairie will not be hauled this season on account of bottoms being covered with water.

“Yours truly, JAMES GADSDEN.”

In answer to the above plaintiffs wrote defendant as follows:

“OMAHA, May 2, 1888.

Mr. James Gadsden, Schuyler, Neb.—DEAR SIR: Answering yours of the 1st. The market seems to be glutted now with hay. Have bought some at \$7.75 on track since we bought that of yours. If you want to sell now and mean business, we will give you \$8.25 per ton on track here, if it is all like the cars we had, but we do not leave this offer open longer than Saturday, but we prefer acceptance by wire, as we are figuring upon 800 tons at a trifle better price. Sample car now coming, and if we get that all, have got to crowd the market here. Have about 140 tons bought now, and would not want yours at any price with that large lot.

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"We would not take the risks of your barn an hour, and you could ship it all as fast as you pleased, having storage for 500 tons. Our full storage capacity here is 1,000 tons. Now, about weights, you can have any one weigh it here after testing our track scale, or we will pay you by the bale.

OSKAMP & HAINES."

On May 4 defendant called at the telephone office in Schuyler and requested the operator to call up plaintiffs, as he desired to talk to them. Plaintiffs have a telephone in their office and Mr. Haines, one of the firm, answered the call, but owing to the condition of the atmosphere the line was not working well, so that the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station between Omaha and Schuyler, proposed to, and did, transmit defendant's message to plaintiffs and repeated their answer to the defendant. The entire conversation was carried on through the assistance of the operator at Fremont, she repeating the message of each party. It is agreed that a contract was entered into at that time by telephone, but there is a conflict in the evidence as to its terms. The plaintiffs introduced testimony tending to show that defendant sold his entire lot of hay at \$8.25 per ton on track in Omaha, to be shipped two car loads per day. On the other hand, the testimony of the defendant goes to show that plaintiffs' proposition contained in their letter of May 2 was not accepted by the defendant, but that the contract was for only two car loads. Two car loads of hay only were shipped to and received by plaintiffs. Subsequently defendant brought an action against plaintiffs to recover for said two car loads of hay, in which Gadsden recovered the full amount claimed, which judgment plaintiffs in error have paid. The burden was upon the plaintiffs to establish the contract and breach of the same, substantially as alleged by them. The jury passed upon the conflicting testimony and found that the terms of the contract respecting the quantity

of the hay sold were as claimed by the defendant. We are satisfied that there is not such a preponderance of the evidence in the plaintiff's favor as to justify us in disturbing the finding.

Error is assigned because the court admitted the testimony of the defendant as to the conversation over the telephone between the witness and Mr. Haines, one of the plaintiffs, as repeated over the wire by Mrs. Cummings, the telephone operator at Fremont. It is contended that the testimony of the witness, of what the operator repeated to him as the conversation progressed, as being said by Mr. Haines, is irrelevant and hearsay. The question thus presented is a new one to this court and there are but few decided cases which aid us in our investigation. Upon principle, it seems to us that the testimony is competent and its admission violated no rule of evidence. It was admissible on the grounds of agency. The operator at Fremont was the agent of defendant in communicating defendant's message to Haines, and she was also the latter's agent in transmitting or reporting his answer thereto to defendant. The books on evidence, as well as the adjudicated cases, lay down the rule that the statements of an agent within the line of his authority are admissible in evidence against his principal. Likewise it has been held that when a conversation is carried on between persons of different nationalities through an interpreter, the statement made by the latter at the time the conversation occurred as to what was then said by the parties is competent evidence and may be proven by calling persons who were present and heard it. This is too well settled to require the citation of authorities. There are certainly stronger reasons for holding the statement made by the operator and testified to by defendant is admissible than in the case of an interpreter. Both Haines and defendant heard and understood the operator at Fremont and knew what she was saying, or at least could have done so. Each knew whether

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his message was being correctly repeated to the other by the operator. Not so where persons converse through an interpreter. If the testimony objected to was incompetent and hearsay, then the testimony of Haines relating to the same conversation should, for the same reason, have been excluded. He did not hear what defendant said, but testified to what the operator reported as having been said. The operator at Fremont was not the agent of the defendant alone, but she was plaintiffs' agent in repeating their answer to defendant's message.

That conversations held through the medium of telephone are admissible as evidence in proper cases, cannot be doubted. Such have been the holdings of the courts in cases where the question has been before them. In a criminal case, *People v. Ward*, 3 N. Y. Crim. Rep., 483, it was held that where a witness testifies that he conversed with a particular person over the telephone and recognized his voice, it was competent for him to state the communication which he made.

In *Wolfe v. M. P. R. Co.*, 97 Mo., 473, it was ruled that if the voice was not identified or recognized, but the conversation is held through a telephone kept in a business house or office, it is admissible, the effect or weight of such evidence, when admitted, to be determined by the jury. (See *Globe Printing Co. v. Stahl*, 23 Mo. App., 451.)

A case quite analogous to the one at bar is *Sullivan v. Kuykendall*, 82 Ky., 483. In that case the parties did not have conversation directly with each other over the telephone, but conversation was conducted by an operator in charge of a public telephone station at one end of the line. It was held that the conversation was admissible in evidence and that it was competent for the person receiving the message to state what the operator at the time reported as being said by the sender. The court in the opinion says: "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him

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an agent to repeat what he is saying to another party; and in such a case, certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information was intended, it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence."

Our conclusion is that the court did not err in admitting the testimony of the defendant.

It is claimed that the court erred in refusing certain instructions requested by the plaintiff, but as they raise the same question we have been considering, the objections will be overruled without further comment. The judgment below is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. GEO. H. HASTINGS, ATTORNEY GENERAL, V. HOWARD B. SMITH.

[FILED JUNE 11, 1892.]

1. **Metropolitan Cities: FIRE AND POLICE COMMISSIONERS: STATUTES.** The act approved April 9, 1891, by which section 145 of chapter 12a, Compiled Statutes of 1889 (charter of the city of Omaha), was so amended as to provide for the appoint-

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ment as fire and police commissioners of said city of members of the three parties casting the largest vote at the last city election, does not take effect until the expiration of the terms of office of the two commissioners who were appointed May, 1889.

2. ———: ———: REMOVAL. The general provision contained in section 172 of the charter of the city of Omaha, for the removal of officers of the city, upon charges, by the district court, is not exclusive.
3. ———: ———: ———: CONSTITUTIONAL LAW. The provision of section 12, article 5, of the constitution, empowering the governor to remove all officers appointed by him, applies only to officers mentioned in the constitution.
4. ———: ———: ———: DISCRETION. Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing.
5. ———: ———: ———: SPECIFIC CHARGES: NOTICE. Where the incumbent is elected or appointed for a definite term, and is removable only for specified cause, the power of removal cannot be exercised until there has been preferred against him specific charges of which he shall have notice, and an opportunity afforded him to be heard in his defense.
6. ———: ———: ———: OFFICIAL MISCONDUCT: CHARGES: DEFENSE. By the charter of the city of Omaha the governor is authorized to remove members of the board of fire and police commissioners only for the cause named, viz., official misconduct and upon charges specifying the particular act or acts to be proved and an opportunity to be heard in their own defense.
7. ———: ———: ———. The question whether the power to remove is judicial in the sense that the officers named are entitled to have the question of cause therefor heard by the courts, and if not, whether the action of the executive can be reviewed by the courts, is not raised in this case and is not determined.

ORIGINAL proceeding in nature of *quo warranto*.

Geo. H. Hastings, Attorney General, V. O. Strickler, and J. W. Edgerton, for relator:

The executive may move without preferring charges, serving notice, or having a formal trial. (*State v. McGarry*, 21 Wis., 496; *Wilcox v. People*, 90 Ill., 186; *Eckloff v. Dist.*

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of Col., 135 U. S., 240; *Keenan v. Perry*, 24 Tex., 253.) A constitutional question is clearly recognized, and where the question is addressed to the discretion of the department called upon to make the construction, the decision is final. (*Wright v. Defrees*, 8 Ind., 298; *State v. Doherty*, 25 La. Ann., 119; *Att'y Gen'l, ex rel. Taylor, v. Brown*, 1 Wis., 413; *People v. Stout*, 19 How. Pr. [N. Y.], 171.) The power to remove an officer is not a judicial power. (*People v. Whitlock*, 92 N. Y., 191; *People v. Stout*, 11 Abb. Pr. [N. Y.], 17; *People v. Mays*, 7 N. E. Rep. [Ill.], 660; *Donahue v. County*, 100 Ill., 94; *Houseman v. Commonwealth*, 100 Pa. St., 222; *State v. Oleson*, 15 Neb., 247; *Smith v. Brown*, 59 Cal., 672; *People v. Hill*, 7 Id., 97; *State v. Prince*, 45 Wis., 610; *Taft v. Adams*, 3 Gray [Mass.], 126; *Ex parte Wiley*, 54 Ala., 226; *Keenan v. Perry*, 24 Tex., 253; *Patton v. Vaughan*, 39 Ark., 211; *Dullam v. Willson*, 53 Mich., 392.) In granting a charter to a metropolitan city the legislature has the right to determine that the board of fire and police commissioners should be non-partisan. The reasons which may have induced the legislature to pass such a law are not properly a subject of inquiry. (Cooley, Const. Lim., 155; *Turner v. Althaus*, 6 Neb., 55; *Bradshaw v. Omaha*, 1 Id., 16.)

An additional brief was filed in behalf of relator, in which *Chas. Ogden* appears with those above named as counsel, and the following contentions were urged: The legislature has power to abolish or abridge the term of any office not mentioned in the constitution. (*People v. Haskell*, 5 Cal., 357; *People v. Banvard*, 27 Id., 470; *State v. Pyle*, 1 Ore., 149; *Bryan v. Cattell*, 15 Ia., 538; *Davis v. State*, 7 Md., 151; *Conner v. Mayor*, 2 Sandf. [N. Y.], 355; *Coffin v. State*, 7 Ind., 157; *Benford v. Gibson*, 15 Ala., 521.) Here is a power lodged in the governor. It is for him to say whether there is official misconduct. (*State v. Doherty*, 25 La. Ann., 119; *People v. Mays*, 117 Ill., 257; *People v. Platt*, 19 How. Pr. [N. Y.], 171; *State v. Mc-*

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Garry, 21 Wis., 496; *Keenan v. Perry*, 24 Tex., 253.) The question is one of constitutional interpretation. (*State v. Yoist*, 25 La. Ann., 396; *State v. Abbott*, 6 S. Rep. [La.], 805.)

Lake, Hamilton & Maxwell, contra:

Section 12 of article 5 of the constitution is not applicable to fire and police commissioners of the city of Omaha. The governor's power to remove such officers is determined and limited by sections 2448 and 2475 of the act governing metropolitan cities. (Cons. Stats., sec. 2448, 2475; *State v. Seavey*, 22 Neb., 454.) The existence of one of the causes for removal is a judicial question, and must be determined by the judicial department of the state. (*Page v. Hardin*, 8 B. Mon. [Ky.], 648; *Honey v. Graham*, 39 Tex., 1; *State v. Pritchard*, 36 N. J. L., 101; *State v. Harrison*, 113 Ind., 434; *People v. Stuart*, 74 Mich., 411.) The governor cannot remove one of the fire and police commissioners until (1) specific charges have been made; (2) notice of such charges given; (3) an opportunity furnished the commissioner to be heard in his own defense. (*Commonwealth v. Slifer*, 25 Pa. St., 23; *State v. Seay*, 64 Mo., 89; *State v. Lusk*, 18 Id., 333; *Hogan v. Carberry*, 4 W. L. Bul., 113; *State v. Hawkins*, 44 O. St., 98; *Dullam v. Willson*, 53 Mich., 392; *Ham v. Board of Police*, 142 Mass., 90; *State v. St. Louis*, 90 Mo., 19; *Board of Aldermen v. Darrow*, 13 Colo., 460; *Biggs v. McBride*, 17 Ore., 640; *Hallygrene v. Campbell*, 46 N. W. Rep. [Mich.], 381; *Field v. Com.*, 32 Pa. St., 478.)

Post, J.

This is an original proceeding by the attorney general against the respondent for the purpose of testing the title of the latter to the office of member of the board of fire and police commissioners of the city of Omaha. The material part of the petition is as follows:

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“That on or about the 2d day of May, 1890, Howard B. Smith respondent herein, was appointed by the Hon. John M. Thayer, who was at that time governor of the state of Nebraska, as a member of the board of fire and police commissioners of the city of Omaha, and thereupon entered into said office, and continued to occupy said office and to exercise the duties thereof until the 23d day of February, 1892. On the said 23d of February, 1892, the Hon. James E. Boyd, who was then and is now the governor of the state of Nebraska, by virtue of the authority vested in him by the constitution and laws of the state of Nebraska, removed the respondent for cause, from said office of fire and police commissioner of the city of Omaha.

“That on the 23d day of February, 1892, D. Clem Deaver was duly appointed and commissioned by the Hon. James E. Boyd, governor as aforesaid, a member of the board of fire and police commissioners of the city of Omaha to succeed Howard B. Smith, respondent; that he accepted said appointment and immediately took the oath of office and filed with the city clerk of the city of Omaha a good and sufficient bond as required by law, and claims the right to exercise the duties and to enjoy the privileges of said office.

“Notwithstanding the appointment of said D. Clem Deaver to said office, said Howard B. Smith, respondent, did on the 23d day of February, 1892, and has continuously since that time, without any legal warrant, claim, or right, used and exercised, and still does unlawfully use and exercise, the office of fire and police commissioner in the city of Omaha, in place of said Deaver, and claims to be a member of said board of fire and police commissioners in place of Deaver, and to have, use, or employ all the rights, privileges, and franchises of said office, to the damage and prejudice to the rights of said city of Omaha, and also against the peace of the state of Nebraska; that the said Deaver is a member of the independent party, one of

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the three political parties casting the highest number of votes at the municipal election held in the city of Omaha in December, 1890.

"That prior to the appointment of said Deaver on the 23d day of February, 1892, as aforesaid, no member of the independent party had been appointed as a member of the board of fire and police commissioners of the city of Omaha as required by law, and that said Deaver is the only member of said board appointed who belongs to said party.

"Said relator therefore prays judgment that the respondent be declared not entitled to said office, and that he be ousted therefrom, and that D. Clem Deaver be declared entitled to said office and installed therein, to assume the execution of the duties thereof."

The answer, omitting formal and immaterial parts, is as follows.

"That in the month of May, 1887, the Hon. John M. Thayer, governor of the state of Nebraska, appointed Christian Hartman, George I. Gilbert, L. M. Bennett, and this respondent fire and police commissioners of the city of Omaha; that said Hartman and Gilbert were reputed to be and were members of one political party, to-wit, of the democratic party, and said Bennett and Smith of a different political party, to-wit, of the republican party; that said Hartman and Bennett were appointed to serve for the term of four years; that said Gilbert and this respondent were appointed to serve for the term of two years; that all of said appointees duly qualified and entered upon the discharge of their duties as such commissioners and continued in the discharge of their duties until the month of May, 1889; that in said month of May, 1889, George I. Gilbert and this respondent were reappointed and duly commissioned by the Hon. John M. Thayer, governor of the state of Nebraska, to serve for a term of four years thereafter; that said Gilbert and this respondent duly qualified and entered upon the discharge

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of their duties as fire and police commissioners of the city of Omaha, and have continued in the discharge of said duties down to the present time; that respondent's term of office does not expire until May 10, 1893.

"That in the month of May, 1891, the Hon. John M. Thayer, governor of the state of Nebraska, reappointed and commissioned Christian Hartman as fire and police commissioner of the city of Omaha for a term of four years, and appointed and commissioned Wm. Coburn, a member of the republican party, for the term of four years to succeed L. M. Bennett; that said Hartman and Coburn duly qualified and entered upon the discharge of their duties as fire and police commissioners of the city of Omaha, and have continued in the discharge thereof since said time.

"That on the 23d day of February, 1892, the Hon. James E. Boyd, governor as aforesaid, without authority of law and without cause therefor, assumed to remove this respondent from his said office of fire and police commissioner of the city of Omaha; that on and before said day there were no charges of any name or nature or of any description against this respondent filed in the office of the governor of the state of Nebraska, or in the office of any other officer of the state of Nebraska, or of the city of Omaha; that notwithstanding the absence of any cause for such action, and notwithstanding the provisions of the constitution and statutes of Nebraska, said Boyd on the 23d day of February, 1892, without any notice given this respondent and without giving this respondent any opportunity to be heard, wrote this respondent the following letter:

"STATE OF NEBRASKA, EXECUTIVE DEPARTMENT,

"LINCOLN, February 23, 1892.

"Howard B. Smith, Esq., Omaha, Neb.—DEAR SIR:
In accordance with the constitution and laws of the state of Nebraska, you are hereby notified that I have this day

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removed you, for cause, from the office of fire and police commissioner for the city of Omaha, and have declared said office vacant.

“Yours truly,

JAMES E. BOYD,
“Governor.”

“And then and thereby assumed to remove this respondent arbitrarily from his said office; that letters of like import were also sent to said Gilbert and Hartman and Coburn; that thereupon said Boyd assumed, without authority of law, to reappoint on the 23d day of February, 1892, said Coburn to succeed himself, and to appoint one George W. Shields to succeed said George I. Gilbert, and to appoint one C. V. Gallagher to succeed Christian Hartman, and to appoint D. Clem Deaver to succeed this respondent.”

To this answer a general demurrer has been filed by the state, thus presenting the real question involved, viz., the power of the governor under the charter of the city of Omaha to remove members of the board of fire and police commissioners for cause other than official misconduct, or for the cause named, without charges, and an opportunity to be heard in their own defense. The office in controversy was created by provision of the act approved March 30, 1887, entitled “An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers, and government,” which, for convenience, will be referred to as the charter of the city of Omaha. Section 145 of said charter as enacted, as far as material to the question under consideration, is as follows;

“In each city of the metropolitan class there shall be a board of fire and police, to consist of the mayor (who shall be *ex-officio* chairman of said board) and four electors of said city, to be appointed by the governor. The governor shall appoint as the commissioners above, four citizens, not more than two of whom shall be of the political party; two of them, of different political party faith and allegiance, shall be designated in their appointment to serve for

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two years, and the other two, also of different political party faith, shall be designated to serve for four years. And thereafter, at the expiration of said term, and each period of two years, the governor shall appoint two members of said board. For official misconduct the governor may remove any of said commissioners; and all vacancies in said board, by death, resignation, or removal, shall be filled by the governor for the unexpired term, and all vacancies from whatever cause shall be so filled that not more than two of the members of said board shall be of the same political party, or so reputed. All powers and duties connected with and incident to the appointment, removal, government, and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be prescribed by ordinance, shall be vested in and exercised by said board."

In 1891 this section was amended so as to provide that at least one of the members of said board shall belong to each of the three political parties casting the largest vote for city officers at the last preceding election. It is provided, however, by the section as amended that "The terms and powers of the members of said board heretofore appointed by the governor of the state shall not be affected or changed by any amendments hereto." If we understand the position of counsel for the state, they claim that this proviso was intended to have a prospective effect only; that the amendment took effect immediately upon its approval, without exception or reservation in favor of the members of the board as then constituted; that it should be construed, not as exempting the then members of the board from the operation, but as a limitation upon the power of future legislatures. The evident purpose of the provision for commissioners from the different parties is to remove the police department of the greatest city of our state from the influence of partisan politics. This object is one to be commended certainly, and to which the courts will give

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effect when possible without violating the recognized rules of construction. The wisdom of a division of the powers and responsibilities of the board between the three parties will not be called in question. For the purposes of this case we will assume that the legislature has power to authorize the removal of the respondent, or any member of the board in order, to give place thereon to a representative of the independent party. It is plain to us, however, that they have not done so.

Construction, as defined by Dr. Leiber, is the "drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclusions that are within the spirit but not the letter of the text." Tested by this definition the language of the amendatory act leaves no room for construction. Respondent was appointed in May, 1889, for the term of four years. He was in office when the amendment took effect in 1891, and his term, in the language of the act, is not "affected or changed" thereby. The solution of the next question presented is attended with greater difficulty, viz., Are the provisions of the charter relating to the removal of members of the board of fire and police commissioners of the city of Omaha in conflict with the provisions of the constitution upon the subject? The constitutional provisions upon the subject are found in sections 10, 11, and 12 of article 5, entitled "Executive Department," as follows:

"Sec. 10. The governor shall nominate and, by and with the advice and consent of the senate (expressed by a majority of all the senators elected voting, by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature.

"Sec. 11. In case of a vacancy during the recess of the senate, in any office which is not elective, the governor

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shall make a temporary appointment until the next meeting of the senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the senate (a majority of all the senators elected concurring by voting yeas and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified.

"Sec. 12. The governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy."

It is claimed on one hand that the provision of section 12 is applicable to all officers appointed by the governor regardless of their character, and is, therefore, a limitation upon the power of the legislature, while on the other hand it is contended that it can have application only to officers named in or contemplated by the constitution.

The case of *Wilcox v. People*, 90 Ill., 186, relied upon by counsel for the state, is in many respects similar to this, and calls for especial notice in this connection. In 1869 an act was passed incorporating the West Chicago park commissioners. The members thereof were appointed by the governor for the term of seven years. They were given power, among other things, to lay out, govern, and manage parks; to pass ordinances for the government of the same; to levy special assessments upon property to be benefited, and to possess, in that regard, all the power then possessed by the city of Chicago in respect to public squares; to acquire property for said purpose by condemnation or otherwise, etc. The act further provides that the members thereof might be removed by the circuit court after trial and conviction upon sworn charges, etc. In 1870 the present constitution of that state was adopted, and which includes the provisions for appointment and removal by the governor, from which ours appear to have

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been copied. In 1877 the governor removed the relator Wilcox and other members of said board for incompetency. In determining the question of his power under the constitution to remove officers the supreme court held, first, that the commissioners named were officers within the meaning of the constitution, not mere municipal officers, but agencies of the state at large, although their functions were to be performed within the town of West Chicago; second, the effect of the constitution was to make the power of removal by the governor co-extensive with his power of appointment; third, the prior act for removal of the commissioners by the court after trial, etc., was in conflict with the constitution and was superseded thereby; fourth, since the constitution had invested the governor with power to remove officers, but was silent as to the mode of its exercise, he might determine for himself whether any of the statutory causes therefor existed, and that his discretion, when exercised, is final and binding upon the courts. That case, although decided subsequent to the adoption of our constitution in 1875, is entitled to a careful consideration in placing a construction upon it.

It may be said to be an elementary rule of construction that whenever a legislative act can be so construed as to avoid a conflict with the constitution and give it the force of law it will be so construed, although such construction may not be the most obvious or natural one. (Cooley on Const. Limitation, 184; *Pleuler v. State*, 11 Neb., 547.) Another recognized rule of construction is that constitutional limitations upon the power of the legislature in respect to offices will be confined to those offices which are specially enumerated in the constitution, unless the contrary clearly appears therefrom. All others may be abolished or the terms, functions, and emoluments thereof changed by law. This rule is fully sustained by the authorities cited by relator. Contemporaneous constructions by the legislature of the constitutional provisions quoted

indicate that they were understood from the adoption of the constitution to apply only to offices named therein. For instance, the first legislature elected under the constitution, in 1877, provided for a commission to revise the laws of the state, to be appointed by the governor without the consent of the senate. In 1879 the legislature created what is known as the fish commission, the members of which were to be appointed by the governor with the consent of the senate. In 1883 the legislature authorized the governor to appoint a superintendent, etc., for the hospital for the insane without the consent of the senate. In 1885 the governor was authorized to appoint a superintendent of the census, also an inspector of bees and honey in each county, without the consent of the senate, and a live stock commission to be confirmed by the senate. These, and many other acts, might be cited, as showing the understanding of the different legislatures that the constitutional provisions in question were to have no application to offices created by law. We are unable to believe, when viewed in the light of twelve years of legislative and judicial history, under the constitution, that it was ever intended as a restriction upon the power of the legislature over officers not within the contemplation of the men who framed it or the people who adopted it. Police commissioners of Omaha are in one sense state officers, since they are charged with a duty in the interest of the public at large. But so far as their appointment, government and removal were concerned, at the time of the adoption of the constitution, they were essentially municipal agents, and not state officers. To our minds, therefore, to hold that such officers are within the constitutional prohibition is neither a necessary nor reasonable construction thereof.

There is still a more cogent objection to the decision in *Wilcox v. People*, viz., it is in conflict with the course of decisions in this state. In *State v. Seavey*, 22 Neb., 454, it was, in effect, held that the constitutional provisions in

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question did not apply to these particular officers, hence it was not essential to a valid appointment that it should be with the consent of the senate. The case of *Douglas County v. Timme*, 32 Neb., 272, we regard as decisive of the question. The provision under consideration in that case was section 16, article 3, of the constitution, which, in terms, provides that the compensation of no public officer shall be increased or diminished during his term of office. It was held that the above provision applies only to offices created by the constitution. The foregoing conclusion is in harmony with *State v. Kalb*, 50 Wis., 176, cited in the opinion of the present chief justice. The reasoning of the courts in the cases named must control in this.

We come now to an examination of some of the provisions of the charter of the city bearing upon the question at issue. In addition to the provision for removal of fire and police commissioners in section 145, it is provided by section 172 as follows:

"Sec. 172. The power to remove from his office the mayor or any councilman or other officer mentioned in this act in any city of the metropolitan class, for good and sufficient cause, is hereby conferred upon the district court for the county in which such city is situated; and whenever any two of the city councilmen shall make and file with the clerk of said court the proper charges and specifications against the mayor, alleging and showing that he is guilty of malfeasance or misfeasance as such officer, or that he is incompetent or neglects any of his duties as mayor, or that for any other good and sufficient cause stated he should be removed from his office as mayor, or whenever the mayor shall make and file with the clerk of said court the proper charges and specifications against any councilman or other officer mentioned in this act, alleging and showing that he is guilty of malfeasance or misfeasance in such office, or that he is incompetent, or neglects any of his duties, or that

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for any other good and sufficient cause stated he should be removed from his office, the judge of such court may issue the proper writ requiring such officer to appear before him, on a day therein named, not more than ten days after the service of such writ, together with a copy of such charges and specifications upon such officer, to show cause why he should not be removed from his office. The proceedings in such case shall take precedence of all civil causes and be conducted according to the rules of such court in such cases made and provided, and such officer may be suspended from the duties of his office during the pendency of such proceedings by order of said court."

It is urged by counsel for respondent that the above provision is exclusive and should be construed as a limitation upon the powers of the governor, and that he is authorized to remove the officer above named only upon a trial and finding by the district court. To this proposition we cannot assent. The governor is, by section 145, empowered to remove these particular officers for a specific cause. This special provision is not in conflict with the general provision for removal of officers of the city. The question, however, to which most prominence is given by counsel is that of the power of the governor to remove without giving the officer an opportunity to be heard in his defense. It is claimed by relator that the removal of an officer is a purely executive act, and therefore the governor may remove without charges, serving notice, or hearing of any kind.

Before referring to the contention of the respondent we will examine some of the authorities relied upon by the relator in addition to *Wilcox v. People, supra*.

State v. McGarry, 21 Wis., 496, is substantially as follows: The county board were, by a special provision applicable to M. county only, authorized to remove the inspector of the house of correction for incompetency, improper conduct, or other cause satisfactory to the board, which

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cause should be particularly assigned in writing and entered upon the minutes of the board, with the yeas and nays upon a vote of removal. It was held that the board might remove *ex parte* without notice or a hearing of any kind. Chief Justice Dixon in the opinion of the court says: "The only question of judicial cognizance is whether the board has kept within the jurisdiction or whether the cause assigned is a cause for removal under the statute."

In *Keenan v. Perry*, 24 Tex., 253, the plaintiff was removed by the governor, as superintendent of the asylum for the insane. The law provided for his removal for incompetency, misconduct, and refusal to discharge the duties of his office. It was held that the law invested the governor with exclusive power to remove, and that his action was final and conclusive. This case, however, appears to be inconsistent with a later case in the same court, which will be noticed hereafter.

In *Wright v. Defrees*, 8 Ind., 298, it was held that the power of the executive to remove an officer for a given cause implies power to judge of the existence of such cause, and the power being vested exclusively in the executive, cannot be controlled in the exercise of any other branch of the government.

In *State v. Doherty*, 25 La., 119, the same reasoning is used as in the last case, with the same conclusion.

In *Att'y Gen'l v. Brown*, 1 Wis., 442, it is held that where the law authorizes the removal of an officer for cause or upon notice, in the absence of express authority for an appeal or review, the courts have no authority to inquire into the grounds for removal. But in that case the governor was expressly authorized to remove the commissioner when he should believe that the best interests of the state demanded such removal.

In *People v. Stout*, 19 How. Pr. [N. Y.], 171, the term of office was not fixed by law, and the mayor was authorized to remove with the consent of the board of aldermen.

In *Territory v. Cox*, 6 Dak., 501, there is an able and exhaustive discussion of the character of the power of the executive to remove officers, concluding with the opinion that it is purely executive and in no sense judicial. The judgment of the court is, however, placed upon the statute which provides for an examination of the accounts of all public officers charged with the disbursement of public money. The examiner is required to report to the governor any failure of duty by financial officers when he (the governor) is authorized in his discretion to take such action for the public security as the exigencies of the case demand. It was held that the executive had authority in his discretion to remove the trustees of an asylum for the insane upon the report of an examination of their accounts by the public examiner.

In *Eckloff v. Dist. of Columbia*, 135 U. S., 240, the commissioners, by statute, had power to abolish any office, reduce the number of employes, remove from office, etc. The only contention in that case was that the unrestricted right above was subject to the limitation of a prior act of congress, but the court held that the prior act had been superseded by the law first above mentioned.

It is contended on the other hand that the governor has no power under the charter of the city to remove the respondent without, first, specific charges; second, notice of such charges; third, an opportunity to be heard in his own defense. Sustaining this proposition are two classes of authorities, as will be hereafter noticed. One class holding that the determination of the existence of cause for removal is a function of the judiciary, and that, as a condition to removal by the executive, the incumbent is entitled to have the question determined by the courts. The others hold that the executive is possessed of limited judicial functions, and that he has power to determine the question of cause for removal.

In *Page v. Hardin*, 8 B. Mon. [Ky.], 648, the constitu-

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tion of Kentucky provided that the secretary of state should hold office during the term of the governor if he so long behave himself well. The governor, by an instrument in due form, declared that the secretary appointed was guilty of willful neglect and refusal to live at the seat of government and perform his duties as secretary, had abandoned the said office, and, in the judgment of the governor, the said office has become vacant for causes aforesaid. The successor appointed was held not entitled to the office. The court says: "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal; in other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may moreover be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defense and proof."

In *Honey v. Graham*, 39 Tex., 1, the governor, during the absence from the state of the defendant, issued a proclamation declaring his office of treasurer vacant, and in an action to determine his title to the office it was held that the action of the governor was void. The court says: "The power of the governor to fill a vacancy when one exists is not disputed. The power to create a vacancy is denied by every authority, except where the office is filled by the governor's choice of an incumbent without concurrence of the senate or election by the people, and the term of office is undefined by law."

In *State v. Police Com'rs*, 36 N. J. Law, 101, the police commissioners of Jersey City had been convicted of malfeasance in office, whereupon the governor declared their offices vacant. This act was held to be void on the ground that the right to remove an officer for misbehavior calls for the exercise of judicial functions. Chief Justice Beasley, in the opinion in which he refers with approval to *Page v.*

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Hardin, supra, says: "Indeed, among all the cases that I have examined, I find no exemplification of the exercise of such an act of authority. On the contrary, it seems to me quite clear that a removal of an officer holding for a definite term, by the sovereign *mero motu*, on the plea of misbehavior, would have been a plain usurpation. I can find nowhere any traces of such a right having been claimed."

In *Com. v. Slifer*, 25 Pa. St., 23, it is said: "We are unwilling to believe that the governor intended, without cause, to remove an officer, appointed for a term of years, before the term had expired. That he possessed the power of removal is conceded; but the power is to be exercised upon cause shown. It exists only where 'the officer fails and neglects faithfully to perform the duties of his office.' It is true that the executive is made the judge, and that his opinion or judgment is conclusive, so far as it relates to the question of removal. But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defense. The reputation and the right of the incumbent to the office for the term specified in his commission are involved, and he has a right to know the accusation and to be heard in his defense."

The case of *Dullam v. Willson*, 53 Mich., 392, is strikingly similar to this in all essential respects. By the constitution of that state the governor is authorized to remove from office any officer for gross neglect of duty, or for corrupt conduct in office, or for any other misfeasance or malfeasance. The notice of removal in that case is as follows:

"EXECUTIVE OFFICE, LANSING, July 2, 1883.

"To *Jas. C. Wilson*—SIR: I have this day, for your official misconduct and habitual neglect of duty, removed you from the office of trustee of the Michigan Institute for the Deaf and Dumb. * * *

"Respectfully,

J. W. BEGOLE."

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The court, in passing upon the power to thus remove, holds that the authority conferred upon the governor to remove officers can only be exercised upon charges which shall specify the particular act relied upon to make out the cause alleged, of which the incumbent shall have notice and a reasonable opportunity for a hearing thereon, at which he may produce proofs. Judges Champlin and Campbell filed carefully prepared opinions, in which they cite the authorities bearing upon the subject in this country and England, the former of whom concludes as follows: "I have examined carefully the authorities cited upon the brief of the learned counsel for relator in support of the position that no notice is required to be given, and that the action of the executive is final and conclusive. It is sufficient to say, without commenting specially upon them, that the reasoning of those cases does not commend itself to my judgment. They appear to me to be opposed not only to the decided weight of authority, but also to the fundamental principles of justice."

In *Hallgrene v. Campbell*, 46 N. W. Rep. [Mich.], 381, it is said: "We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and wherever cause must be assigned for the removal of an officer, he is entitled to notice and a chance to defend."

In *Ham v. Board*, 142 Mass., 90, the board of police were authorized to remove for cause. It was held that they had no power to remove until after notice and an opportunity by the official in question to be heard in his own defense.

In *State v. St. Louis*, 90 Mo., 19, the statute authorized the removal of any elected officer of the city of St. Louis for cause. The court says: "When the removal is not discretionary, but must be for cause, as is the case here, and nothing is said as to the procedure, a specification of

the charges, notice, and an opportunity to be heard, are essential. This, we think, is the result of the authorities before cited. The proceedings in this case are wanting in all these requisites; for, if indeed any charges were ever made against the relator at all, they were the product of the minds of the members of this committee and by them kept from the knowledge of the accused."

In Dillon on Mun. Corp. [4th Ed.], sec. 250, the author says that where the right of removal is confined to specific causes, such power cannot be exercised until there have been formulated charges against the officer, notice thereof, and an opportunity for defense. The following cases also support the principle of the foregoing: *Biggs v. McBride*, 17 Ore., 640; *State v. Hawkins*, 44 O. St., 98; *Hogan v. Carberry*, 4 Cin. Law Bul., 113.

It seems plain to us that the doctrine of these cases is in accord with the weight of authority and is supported by the soundest reasons. The tendency of current opinion is strongly in the direction of fixed and definite terms of office, and in favor of making the officeholder, so far as practicable without impairing the public service, independent of the appointing power. It is in obedience to a settled public conviction upon the subject that congress annually appropriates large sums of money to accomplish reforms in the civil service of the general government. It is this sentiment that is expressed in the provision in the charter of the city of Omaha under consideration. The purpose of the legislature in adopting the provision in question was twofold: First, as has been said, to provide an efficient police department for a great city by removing it from the influence of local politics; second, to provide against the effects of fluctuation in state politics, by fixed terms for the police commissioners, to be removed for specific causes only. Without further elaboration our conclusion is that the charter of the city of Omaha does not authorize the removal of the fire and police commis-

Gillespie v. City of Lincoln.

sioners thereof except for official misconduct, nor until they have been notified of the particular act or acts of misconduct with which they are charged, and an opportunity afforded them to be heard in their own defense. The questions whether the power of removal is judicial in the sense that the officers aforesaid are entitled to have the question of cause for removal submitted to the courts for determination, and if not, whether the courts have jurisdiction to review the action of the governor, are not raised by the record and are not determined. Since the answer states a complete defense, it follows that the demurrer thereto should be

OVERRULED.

THE other judges concur.

CLARK D. GILLESPIE, ADMINISTRATOR, V. CITY OF
LINCOLN.

[FILED JUNE 11, 1892.]

1. **Municipal Corporations: FIRE DEPARTMENT: NEGLIGENCE.**
A city is not liable at common law for the negligent acts of the members of its fire department.
2. ———: ———: ———: **CASE STATED.** Plaintiff's intestate was struck and killed by a ladder wagon or truck belonging to the fire department of the defendant city, through the negligence of the driver thereof, a member of said department, while driving along one of the streets of the city for the purpose of exercising a team of horses belonging to the department. *Held,* That the city is not liable.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

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Chas. O. Whedon, for plaintiff in error:

Liability of a city for the acts of its employes "is based upon the right which the employer has to select his servants, to discharge them if not competent, and to direct them while in his employ." (*Kelly v. New York*, 11 N. Y., 432.) It is the duty of a municipal corporation to keep its streets in a reasonably safe condition for public use (*Lincoln v. Walker*, 18 Neb., 251; *Same v. Gillilan*, Id., 119; *Same v. Holmes*, 20 Id., 39; *Same v. Woodward*, 19 Id., 259; *Plattsburgh v. Mitchell*, 20 Id., 230; *Hutson v. New York*, 9 N. Y., 163; *Todd v. Troy*, 61 Id., 506; *Clemence v. Auburn*, 66 Id., 334; *Evans v. Utica*, 69 Id., 166; *Niven v. Rochester*, 76 Id., 619; *Weed v. Ballston*, Id., 329; *Saulsbury v. Ithaca*, 94 Id., 27; *Dewire v. Bailey*, 131 Mass., 169), and the agents of the corporation are bound to exercise an active vigilance in the performance of that duty. (*Todd v. Troy*, 61 N. Y., 506; *Atlanta v. Perdue*, 53 Ga., 607; *Rosenberg v. Des Moines*, 41 Ia., 415; *Chicago v. Hoy*, 75 Ill., 530; *New York v. Bailey*, 2 Denio [N. Y.], 433.) One of the duties of a municipal corporation is to use reasonable care in the conduct of any work which it undertakes. (*Chicago v. O'Brennan*, 65 Ill., 160; *Chicago v. Turner*, 80 Id., 419; *Freeport v. Isbell*, 83 Id., 440.) When the city has the appointment and supervision of the employes, and the duty to be performed is for its benefit, it is liable for their negligent acts. (*New York v. Bailey*, 2 Denio [N. Y.], 433; *Torrey v. New York*, 12 Hun [N. Y.], 542; *Walsh v. New York*, 41 Id., 299.) So where the duty is imposed on the city and the officers or departments are simply made by the charter agents of the corporation. (*Martin v. Brooklyn*, 1 Hill [N. Y.], 545; *Niven v. Rochester*, 76 N. Y., 619; *Barnes v. Dist. of Col.*, 91 U. S., 540; *Ehrgott v. New York*, 96 N. Y., 264; *Groves v. Rochester*, 39 Hun [N. Y.], 5. The municipal corporation is as much subject

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as a private citizen to the usual rule, *sic utere tuo ut alienum non lædas*. (*Goodloe v. Cincinnati*, 4 O., 513; *Rhodes v. Cleveland*, 10 Id., 160; *McCombs v. Town Council*, 15 Id., 479.)

E. P. Holmes, contra:

It is the uniform rule, as established by a long line of decisions, that there is no liability on the part of a municipality for injuries occasioned by the negligent act of members of its fire department. (*Dillon, Mun. Corp.*, sec. 976; *Grube v. St. Paul*, 34 Minn., 402; *Fisher v. Boston*, 104 Mass., 94; *Wilcox v. Chicago*, 107 Ill., 334; *Greenwood v. Louisville*, 13 Bush [Ky.], 226; *Wheeler v. Cincinnati*, 19 O. St., 19; *Hayes v. Oshkosh*, 38 Wis., 314; *Condict v. Jersey City*, 46 N. J. Law, 157; *Hafford v. New Bedford*, 16 Gray [Mass.], 297; *Jewett v. New Haven*, 38 Conn., 368; *Hurford v. Omaha*, 4 Neb., 336; *Veazie v. China*, 50 Me., 526; *N. Y. v. Furze*, 3 Hill [N. Y.], 612; *Barney v. Lowell*, 98 Mass., 570; *Van Horn v. Des Moines*, 63 Ia., 447; *Ogg v. Lansing*, 35 Id., 495; *Yule v. New Orleans*, 25 La Ann., 394.)

Post, J.

This case comes into this court on a petition in error. The error assigned is the sustaining of a demurrer by the district court of Lancaster county to the petition of plaintiff in error, the material part of which is as follows:

“That on and prior to the 29th day of May, 1889, the said defendant had an organized and paid fire department, and had and owned engines, hose, hose carts, ladders, wagons, trucks, and other apparatus for the use by, and which was used by, said defendant in its fire department in extinguishing fires.

“That said defendant then had and owned horses which were used by said defendant in drawing said wagons, trucks, hose carts, and engines to the place in said city where a

fire might be burning, and for other purposes; that among other apparatus the said defendant then owned a large truck, or wagon, upwards of twenty feet in length, which was used by the defendant in transporting about the city long ladders used by said fire department.

“That said defendant, at the time of committing of the wrongs hereinafter mentioned, had in its pay and employ one Peter Keykendall, who was under the direction and control of the defendant, and whose duty it was, under the direction of said defendant, to drive the team attached to said ladder truck, or wagon, about the city; and said wagon was not at the time hereinbefore mentioned, May 29, 1889, supplied with any brake or lock, or other appliance, for stopping said wagon when in motion, or to assist the horses to said wagon attached in stopping the same; that the distance between the front and hind wheels to said truck or wagon was about eighteen feet; that said wagon or truck, when loaded with ladders and other apparatus, carried thereon, and with the driver thereon, weighed upwards of two thousand pounds.

“That Ninth street extends through said city from north to south and intersects and crosses P, R, and S streets in said city, and said Ninth street and said P, R, and S streets have for many years last past been public streets in said city, and on said 29th day of May, 1889, said Ninth street was paved with wood, and between S and P streets was a paved and smooth street, and from S to R street had a smooth and level surface and was free from obstruction and was paved with wood.

“That the said Peter Keykendall, under his employment, was by the defendant required to drive said ladder truck or wagon about the city, when no fires were burning which required to be extinguished by said defendant or said fire department, for the purpose of exercising the horses to said wagon attached, and was also required to drive said horses attached to said wagon when the same was heavily loaded,

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on and along the public streets of the said city at a furious rate of speed and as fast as said horses could be made to run, without any regard whatever for the lives or safety of citizens of the city who might be upon the streets, and this when no fire or fires were burning which required the action of the defendant or its fire department to extinguish, for the sole and only purpose of exercising said horses.

“That on the 29th day of May, 1889, the said Peter Keykendall, then being in the employ of the defendant and acting under the orders and direction of the defendant, drove a span of large, high-spirited, and powerful horses, attached to said ladder truck or wagon, about the public streets of said city for the purpose of exercising said horses. Said wagon or truck was loaded with ladders and other apparatus and the driver rode thereon, and said wagon with its load weighed upwards of two thousand pounds; that said wagon was not on said day supplied with any lock or brake or other appliances for stopping or assisting in stopping said wagon when in motion, as the defendant then well knew.

“That said Keykendall on said day drove said span of horses to said wagon attached as aforesaid on and along said Ninth street at a furious and dangerous rate of speed and as fast as said horses could be driven, when there was no fire burning which required the services of said fire department or any of its members or employes of said city to extinguish, but said horses were driven for exercise only; that Clark D. Gillespie, an infant of tender years, being then but six years of age, was at the time crossing said Ninth street near the place where said street intersects and crosses R street at the north side of said R street, and said span of horses were driven upon said Clark D. Gillespie and he was thrown upon the pavement and the front wheel of said wagon was driven over and across his body; that said boy, after being knocked down and run over by said horses and by one of the front wheels of said wagon, raised

his head and attempted to rise from the pavement when he was struck and run over by one of the hind wheels of said truck or wagon and was instantly killed. That the killing of said boy was caused by the driving over him of said team and wagon as aforesaid.

"Plaintiff further says that at said time said team and wagon was not being driven to any fire which required to be extinguished, but was being driven on and along said street for the sole and only purpose of exercising said horses under the direction and orders of the defendant at a dangerous rate of speed, and were driven so fast that it was impossible for the said Clark D. Gillespie to escape being run over. That the said Clark D. Gillespie was the son of the plaintiff.

"That on the 22d of July, 1889, the plaintiff was by the county court of said Lancaster county duly appointed administrator of the estate of said Clark D. Gillespie, and gave the bond by said court required and took the oath by law required in such cases.

"That on or about the 22d of July, 1889, plaintiff presented to the city council his claim for damages sustained by the estate of said Clark D. Gillespie by reason of the killing of him, the said Clark D. Gillespie, together with the names of the witnesses and a statement of the time, place, nature, circumstances, and cause of the injury and damages complained of, which claim was verified by the oath of the plaintiff; that afterwards, and on or about the 12th of August, 1889, said claim was by the defendant and the mayor and council thereof, to which it was presented as aforesaid, rejected and disallowed.

"That by reason of the killing of said Clark D. Gillespie as aforesaid the estate of the deceased has sustained damages in the sum of \$5,000, for which sum plaintiff prays judgment with interest from the 12th of August, 1889, and for costs."

The contention of the defendant in error is that no lia-

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bility exists on the part of a city like Lincoln for injuries occasioned by the negligent acts of members of its fire department. This exemption is placed upon the ground that in performing their duties, firemen act in obedience to a legislative command, and although appointed and paid by the city they are to be regarded rather as officers charged with a public duty, than as servants of the city. Public policy, it is claimed, forbids the imposition upon a city of liability for the negligence of this class of employes, since they are engaged in the discharge of a duty imposed by law for the welfare of the public, and from which the city, as a corporation, derives no benefit or advantage. Counsel for plaintiff in error, while not conceding the rule to be as stated, insists that it could have no application to the case at bar for the reason that the statute under which the fire department of the city of Lincoln is organized and governed is permissive only, and whatever is done by the city in that respect it does voluntarily, and therefore the rule *respondeat superior* is applicable. To this proposition we cannot consent. The provision on the subject is found in subdivision XXXIII, section 67, of the charter of the city of Lincoln: "Cities governed under the provisions of this act shall have power by ordinance to provide for the organization of a fire department, to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, and bucket companies, and to prescribe rules of duty and the government thereof, with such penalties as the council may deem proper, not exceeding one hundred dollars, and to make the necessary appropriations therefor, and to establish regulations for the protection from and the extinguishment of fires." This language, although permissive in form, is in one sense mandatory. True it is not mandatory in the fullest sense of the word, since the duty of the city to provide protection to life and property from fire cannot be enforced by *mandamus* or other remedy. It is not every duty imposed upon the state

or the different agencies thereof called municipal corporations that can be thus enforced. (*Kentucky v. Dennison*, 65 U. S., 66; Dillon on Munic. Corp. [4th Ed.], 98.) It is none the less a duty on the part of the city because the law has not provided a means for its enforcement by the mandate of the court. There existed a moral or equitable obligation on the part of the defendant city to provide means of protection from fires within its limits, and in the discharge of that duty provision was made for its fire department. If defendant is to answer for the wrongful act of Keykendall, the driver of the ladder wagon, it must be upon the rule *respondent superior*. It is clear that upon no other principle is it chargeable. In this connection it should be noted that the claim is made by plaintiff that Keykendall, in driving the team at the time in question, was acting within the scope of his authority. Counsel says in his brief: "The exercising of the team was a proper thing to do. It lies in the way of a proper discharge of the functions of the department. It was not *ultra vires*. The way in which it was performed is what we complain of." Taking it for granted, then, that the driving of the team at the time in question was a proper exercise of the functions of the fire department of the city, and within the line of duty of the driver, we will proceed to examine some of the authorities bearing upon the question involved.

In Dillon on Munic. Corp. [4th Ed.], 974, the rule is stated thus: "If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporative powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of *respondet superior* applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a

public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable."

Among the officers who are not servants of a city within the foregoing rule, and for whose negligence it will not be chargeable, the learned author enumerates policemen, health officers, and firemen. The rule as to the liability of the latter the author states in section 976, as follows: "The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city. Without being expressly given the maxim of *respondeat superior* has therefore no application." To the same effect see 2 Thompson on Neg., 735; Sherm. & Redfield on Neg., 295, 296.

Hayes v. The City of Oshkosh, 33 Wis., 314, was an action to recover damages resulting from a fire occasioned by the negligent use of an engine employed in suppressing a fire in the neighborhood. Chief Justice Dixon, in the opinion, says: "Neither the charter of the city nor the general statutes of the state contain any peculiar provision imposing liability in cases of this kind, and the decisions :

elsewhere are numerous and uniform that no such liability exists."

Wilcox v. City of Chicago, 107 Ill., 334, is directly in point. In that case the plaintiff sought to recover for injuries occasioned by a collision between his carriage and a hook and ladder wagon of the city, through the negligence of the driver while in the discharge of his duty. In the opinion of the court, by Judge Walker, it is said: "To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great if not greater burdens than are suffered from damage by fire. Sound public policy would forbid it, if it were not prohibited by authority."

In *Fisher v. City of Boston*, 104 Mass., 94, the plaintiff received personal injuries through the negligent use of hose by a fire company of the city in extinguishing a fire on adjoining premises. Judge Gray, in the opinion of the court, says: "But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity, nor is any part of the expense thereof authorized to be assessed upon owners of buildings or other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town or highway."

In *Hafford v. New Bedford*, 16 Gray [N. Y.], 297, the plaintiff was struck and injured by a hose cart on a sidewalk of a public street. The fireman in charge thereof had negligently drawn it along and upon the sidewalk from the engine house ten or fifteen rods distant. The city was held not liable.

In *Jewett v. New Haven*, 38 Conn., 368, the plaintiff, without negligence on his part, was struck and injured in a public street by a hose cart which was being driven to

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the engine house for an additional supply of hose for use at a fire then raging, but at a dangerous rate of speed and without the exercise of reasonable precaution for the safety of passers-by. It was held the rule *respondeat superior* did not apply and the city was not chargeable.

In *Dodge v. Granger*, Sup. Ct. R. I., 24 Atl. Rep., 100, a very recent case, on the authority of cases above cited, the city was held not liable for injuries caused by contact with a ladder projecting across the sidewalk in front of an engine house negligently permitted by the firemen to remain in that position while engaged in cleaning the house. This principle has been repeatedly applied to other officers or employes of municipal corporations, as in *Maxmilian v. Mayor*, 62 N. Y., 160, where plaintiff's intestate was killed by a collision with an ambulance wagon, which was caused by the negligence of the driver, an employe of the commissioners of public charities and corrections; *Haight v. New York*, 24 Fed. Rep., 93, where, following the last case, it is held that the city is not liable for damage caused by a collision with a steamboat owned by the city, but in the exclusive use of the board of charities and corrections; *Condict v. Jersey City*, 46 N. J. Law, 157, where the deceased was killed through the negligence of a driver employed by the board of public works to remove garbage from the streets to a public dumping ground; *Calwell v. City of Boone*, 51 Ia., 687, where the injury resulted from the wrongful act of a policeman paid by the city; *Ogg v. City of Lansing*, 35 Ia., 495; *Brown v. Vinalhaven*, 65 Me., 402, and *Barbour v. Ellsworth*, 67 Id., 294, in each of which it was held that the city was not chargeable with the negligence of its health officers; *Burrill v. Augusta*, 78 Me., 118, in which plaintiff's horse was frightened by the escape of steam from a fire engine negligently allowed to remain in the street; *Elliott v. Philadelphia*, 75 Pa. St., 347, where plaintiff's horse was killed through the negligence of a police officer by whom he had been arrested for violation of an

ordinance of the city against fast driving; *Bryant v. St. Paul*, 33 Minn., 289, where the plaintiff fell into a vault negligently left open and exposed by the board of health. In the last case the distinction between the class of officers above mentioned and other agents of the city is clearly pointed out by Vanderburg, judge, as follows: "The duties of such officers are not municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body."

There are many cases in the reports of the states and the United States in harmony with the foregoing, among which are *Smith v. Rochester*, 76 N. Y., 506; *Van Horn v. Des Moines*, 63 Ia., 447; *O'Meara v. New York*, 1 Daly [N. Y.], 425; *Wheeler v. Cincinnati*, 19 O. St., 19; *Howard v. San Francisco*, 51 Cal., 52; *Ham v. Mayor*, 70 N. Y., 459; *Welsh v. Rutland*, 56 Vt., 228.

The cases cited by plaintiff may be said to sustain the proposition that the law imposes upon a city the duty to keep its streets in a reasonably safe condition for use by the public, and for a neglect of that duty it will be answerable. They are plainly distinguishable from those to which we have referred, since the duty of the city with reference to its streets is a corporate duty. As said by Judge Folger in *Maxmilian v. Mayor*, *supra*: "It is a duty with which the city is charged for its own corporate benefit to be performed by its own agents as its own corporate act." This distinction is made also in *Ehrgott v. Mayor*, 96 N. Y., 274, one of the cases cited by plaintiff. To the extent that the exemption of a city from liability for acts of officers herein enumerated affects the general rule of liability for obstruction of the streets of the city it must be held to be an exception thereto—an exception based upon a public policy which subordinates mere private interests

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to the welfare of the general public. The judgment is right and is

AFFIRMED.

THE other judges concur.

M. E. SMITH ET AL. V. BOYER & DAVIDSON.

[FILED JUNE 11, 1892.]

1. **Attachment: ORDER DISCHARGING: REVIEW.** In reviewing an order of the district court or a judge thereof, discharging an attachment, the evidence being conflicting, the same presumption prevails in favor of the correctness of the ruling complained of, as in cases of finding and judgment upon a formal trial.
2. ———: ———: ———. The order of a judge discharging an attachment in such case will not be disturbed by this court unless it is clearly against the weight of evidence.

REHEARING of case reported 29 Neb., 76.

R. M. Snavelly, and *E. M. Bartlett*, for plaintiffs in error.

G. M. Lambertson, *contra*.

Post, J.

The facts in this case are fully stated in the opinion previously filed, 29 Neb., 76. At the time of the filing of that opinion the conclusion was reached by the court that the order of the district court discharging the attachment was not sustained by the evidence and that the judgment should be reversed. A rehearing was subsequently allowed, and, with the assistance of additional briefs, has been again considered.

It is not necessary to discuss the question of the validity of the mortgages to Holland and the First National Bank

of Indianola. There is no evidence in the record which tends to impeach either; nor is that question put in issue by the motion to discharge the attachment. The only question presented by the motion is the right of plaintiffs to an attachment against the defendants Boyer & Davidson. Defendants, at the time of the execution of the mortgages, were indebted to Raymond Bros. exceeding \$2,000. For this amount they executed their three separate notes and immediately confessed judgment on each in the county court of Red Willow county, but refused to confess judgment in favor of plaintiffs. In addition to the stock of goods covered by the mortgages there is no evidence in the record that defendants owned any property except the sum of \$187.50 due from one McClung, which, after the execution of the mortgages, Boyer, one of defendants, discounted for \$175; a bill, the amount of which does not appear, due from one Sibbett, which was paid September 24 from the proceeds of a loan upon a note with Boyer as surety, and a trotting horse estimated to be worth \$300 or \$400. It is in evidence, however, that Boyer's wife claimed the horse in question as her separate property. The only witness who claims any knowledge of the facts testifies that Davidson had no property whatever aside from his interest in the stock of goods. There is also evidence tending to prove that Boyer "run away" to Kansas, but this is denied by Mr. Starr, one of the witnesses for defendants, who testifies positively that Boyer remained in Indianola for two days after the day on which he is charged with having fled to Kansas. There is other evidence in the record, but the testimony tending to establish the ground for attachment is either denied by other witnesses or explained in a way which is consistent with the honest intentions of the defendants.

The motion to discharge raised a question of fact to be determined by the district judge, and his finding thereon should not be disturbed unless clearly against the weight

F., E. & M. V. R. Co. v. Mattheis.

of evidence. This identical question was before the court in *Britton v. Boyer*, 27 Neb., 522, in which it was held that the ruling of the district judge in discharging the attachment was supported by sufficient evidence, and the order aforesaid was affirmed. It has been repeatedly held by this court that the same presumption exists in favor of the correctness of the ruling of the court or judge upon a motion to discharge an attachment where the evidence is conflicting as of any other finding or judgment. (*Mayer v. Zingre*, 18 Neb., 458; *Johnson v. Steele*, 23 Id., 82.) Had the motion been overruled by the district judge it is probable that his decision would have been sustained by an application of the same rule in view of the conflicting character of the evidence. It is the opinion of some of the members of the court that the preponderance of evidence is in favor of the attachment, but not so clearly so as to call for a reversal of the order discharging it. The rule above stated is a safe one, and justice is more certain of attainment by it than by the trial of issues of fact anew in this court. The order of the district court is

AFFIRMED.

THE other judges concur.

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FREMONT, E. & M. V. R. Co. v. CLAUS MATTHEIS.

[FILED JUNE 11, 1892.]

1. **Eminent Domain: DAMAGES: STATUTORY REMEDY EXCLUSIVE.** In this state the special remedy provided by statute for determining, by condemnation proceeding, the damage to land when a part thereof is taken for right of way purposes by a railroad company, is exclusive. (*R. V. R. Co. v. Fink*, 18 Neb., 82.)

2. ———: ———: **APPRAISERS: A PETITION FOR THE APPOINTMENT**

of a commission to appraise damage for the taking of property for right of way, which sets forth that the petitioner desires to acquire a strip 100 feet wide through a particular tract, and refers to an accompanying plat for a more particular description, is sufficient.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

John B. Hawley and B. T. White, for plaintiff in error:

Plaintiff having by acquiescence permitted defendant to construct and operate its railroad over his land, trespass, ejectment, or injunction will not lie. (*Right v. Beard*, 13 East [Eng.], 210; *Hamlin v. R. Co.*, 61 Wis., 515; *M. & N. R. Co. v. Strange*, 63 Wis., 178; *Goodin v. Canal Co.*, 18 O. St., 169; *St. Julien v. R. Co.*, 33 Am. & Eng. R. Cases [La.], 92; *Pierce, Railroads*, 169; *L. N. A. & C. R. Co. v. Soltwedde*, 36 Am. & Eng. R. Cas. [Ind.], 577; *Kittell v. R. Co.*, 55 Vt., 96.) Where the statute gives the railroad company and the land-owner the equal right to institute condemnation proceedings, that remedy must be sought by the land-owner to recover the value of the land taken and damages to the remainder not taken. (*Pierce, Railroads*, 178, 224; 1 Rorer, *Railroads*, 338; *Mills, Em. Dom.*, sec. 87; *R. V. R. Co. v. Fink*, 18 Neb., 82; *Hull v. R. Co.*, 21 Id., 374; *B. & M. R. Co. v. Reinhackle*, 15 Id., 279; *R. V. R. Co. v. Fellers*, 16 Id., 169; *Calving v. Baldwin*, 1 Wend. [N. Y.], 667; *Flagg v. Worcester*, 79 Mass., 601; *Daniels v. R. Co.*, 35 Ia., 129; *L. M. R. Co. v. Whitacre*, 8 O. St., 590; *Hanlan v. R. Co.*, 61 Wis., 521.) The condemnation proceedings offered in evidence by the defendant and admitted by the court were conclusive upon the parties, and estopped the plaintiff from all claim on account of the matters set forth in his petition. (*Bradley v. Steam Packet Co.* 9 Pet. [U. S.], 107; *B. & P. R. Co. v. Fifth Bap. Ch.*, 108 U. S., 317; *Uline v. R. Co.*, 101 N. Y., 98; *Ma-*

hon v. R. Co., 24 Id., 659; *Hussner v. R. Co.*, 114 Id., 433; *Powers v. Ware*, 4 Pick. [Mass.], 106; 1 Sutherland, Damages, 189, 190, 191; 1 Herman, Estoppel and Res Adjudicata, secs. 219, 222; *Haines v. Flinn*, 26 Neb., 380; *Gayer v. Parker*, 24 Id., 644; *Weber v. Morris*, 36 N. J. L., 213; *Madden v. Smith*, 28 Kan., 799; *Covington & C. Bridge Co. v. Sargent*, 27 O. St., 233; *Baird v. U. S.*, 96 U. S., 430; 2 Beach, Law of Railways, secs. 818, 824; Lewis, Em. Dom., sec. 565; *Spaulding v. Arlington*, 126 Mass., 492; *Van Schoick v. Canal Co.*, 20 N. J. L., 249; *C. & A. R. Co. v. S. & N. W. R. Co.*, 67 Ill., 142; *C. R. I. & P. R. Co. v. Smith*, 111 Ill., 363; *White v. R. Co.*, 23 N. W. Rep. [Ind.], 782; *Masters v. McHolland*, 12 Kan., 23; *People v. Wasson*, 64 N. Y., 167; *State v. R. Co.*, 29 Neb., 412.) If plaintiff was not satisfied with the award in the condemnation case, his only remedy was by appeal. By his dismissal of his appeal he is estopped to further complain. (*Bosland v. R. Co.*, 8 Ia., 148; *A. T. & S. F. R. Co. v. Patch*, 28 Kan., 470; *Reisner v. Strong*, 24 Id., 410; *Allison v. Commissioners*, 54 Ill., 170; *M. & N. W. R. Co. v. Woodworth*, 32 Minn., 452; *State v. G. I. & W. C. R. Co.*, 31 Neb., 209.)

Switzler & McIntosh, contra:

The facts do not admit of the application of the principle of estoppel plaintiff has not acquiesced. (*Spofford v. R. Co.*, 66 Me., 47.) When applied to private or quasi-public corporations, the remedy by statute is cumulative. (*Crawfordsville, etc., R. Co. v. Wright*, 5 Ind., 252; *In re Buffalo*, 78 N. Y., 362; *Robinson v. Mathwick*, 5 Neb., 255; *Dusenbury v. M. U. Tel. Co.*, 64 How. Pr. [N. Y.], 206.) Even in the case of public corporations, the remedy is exclusive only when the statutory manner of proceeding has been strictly complied with. (*Smith v. R. Co.*, 67 Ill., 195; *Hamor v. Bar Harbor*, 78 Me., 133; *Perry v. Worcester*, 6 Gray [Mass.], 546; *Hull v. West-*

field, 133 Mass., 434; *Spring v. Russell*, 7 Me., 273; *Loop v. Chamberlain*, 20 Wis., 146; *Hall v. Pickering*, 40 Me., 556; *Wamesit Power Co. v. Allen*, 120 Mass., 352; *Badgerly v. Commissioners*, 1 Dis. [O.], 320.) The answer is demurrable and no evidence should be received under it. It does not set forth the oath taken, the description of the land taken, or that the land was the same as that involved in this case. (*Hazen v. R. Co.*, 2 Gray [Mass.], 579; *Pres. & Div. R. Co. v. Wright*, 5 Ind., 252; *Stanton v. Henry*, 11 Johns. [N. Y.], 133; *Pio Pico v. Colimas*, 32 Cal., 578; *Squires v. Seward*, 16 How. Pr. [N. Y.], 478; *Althause v. Rice*, 4 E. D. Smith [N. Y.], 348; *Ferris v. Brown*, 3 Barb. [N. Y.], 105; *Haight v. Badgeley*, 15 Id., 499; *London v. Lumber Co.*, 8 S. Rep. [Ala.], 281; *Natl. Docks, etc., Co. v. State*, 21 Atl. Rep. [N. J.], 570; *Vail v. R. Co.*, 20 N. J. L., 189; *Penn. R. Co. v. Porter*, 29 Pa. St., 169; *Jeffries v. Swampscott*, 105 Mass., 535; *Lewiston v. Co. Com'rs*, 30 Me., 19; *Smith v. R. Co.*, 105 Ill., 511.) The notice served on the land-owner failed to give a description of the land, to state the time when the commissioners would appear, or to give any description of the cuts and fills, hence it was fatally defective. (*Penn. R. Co. v. Porter*, 29 Pa. St. 168; *P. & R. I. R. Co. v. Warner*, 61 Ill., 52; *Spofford v. R. Co.*, 66 Me., 44; *Wilson v. Lynn*, 119 Mass., 174.) An appeal is no waiver of trespass, although the appeal may be still pending. (*Stringham v. R. Co.*, 33 Wis., 471; *Ray v. R. Co.*, 4 Neb., 439; *Damp v. Dane*, 29 Wis., 420). Plaintiff could sue for the value of the land and damages, and judgment in this case vests title in the railroad and settles the controversy. (*I. & G. N. R. Co. v. Benitos*, 59 Tex., 326; *W. & W. R. Co. v. Fechheimer*, 36 Kan., 45; *Jamison v. Springfield*, 53 Mo., 224; *Soulard v. St. Louis*, 36 Id., 554; *Blesch v. R. Co.*, 43 Wis., 192; *Stein v. Burden*, 24 Ala., 146; *Mitchell v. Ladew*, 36 Mo., 532; *Selden v. Canal Co.*, 24 Barb. [N. Y.], 362.) Immature crops are elements of damage.

F., E. & M. V. R. Co. v. Mattheis.

(*Merrett v. Bowe*, 67 Ia., 636; *Gilmore v. Pitts*, 104 Pa., St., 275; *Gilbert v. Kennedy*, 22 Mich., 117.)

Post, J.

This was an action of trespass in the district court of Douglas county. The trespass charged is the construction upon and through the land of the plaintiff below, of the railroad track of the defendant company, and the appropriation and use of a part of said premises for the purpose aforesaid. In his petition he alleges that he has been damaged as follows: First—Value of land taken, \$2,500. Second—Value of growing crop (garden vegetables) thereon \$2,000. Third—Damage to remainder of premises, \$8,000. The defendant relied upon a prior condemnation of the property taken, for the purpose of its right of way, and compensation paid therefor. The case was submitted to a jury upon the testimony of the plaintiff and the following verdict returned :

“We, the jury duly impaneled and sworn to try the issues in this case under the instruction of the court and the evidence, do find as follows:

“First—The land of the plaintiff not taken by the defendant was damaged by reason of the construction of defendant’s road in the sum of \$3,500.

“Second—We further find that the value of the crops or growing vegetables which were destroyed by the defendant in the construction of its said road and which belonged to the plaintiff was of the sum of \$1,000.

“Third—We further find that the total damage to the plaintiff for crops or vegetables destroyed by defendant, and the damage to the remainder of plaintiff’s land, is the sum of \$4,500, which amount we so assess in his favor.

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| Damages..... | \$4,500 00 |
| Interest..... | 840 00 |

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|------------|------------|
| Total..... | \$5,340 00 |
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“PIERCE RYAN, Foreman.”

A motion for a new trial having been overruled, judgment was entered upon the verdict and the case removed to this court by a petition in error. It is necessary to notice but a few of the questions presented by the record. From the bill of exceptions it appears that a petition had been previously presented to the county judge of said county for the appointment of commissioners to assess the damage to the plaintiff by reason of the appropriation of the property in question for its right of way; that in accordance with the prayer of said petition six disinterested freeholders were selected and sworn to assess the damage as aforesaid; that said commissioners subsequently and in due time personally examined said property and assessed plaintiff's damage at \$960, as appears from their report, as follows:

"We, the undersigned, disinterested freeholders and commissioners, residents of Douglas county, Nebraska, appointed by the county judge of said county to appraise the damages accruing to Claus Mattheis by reason of the appropriation of that part of the following described real estate, taken for right of way, side tracks, wood and water stations, depot grounds, and railroad purposes, by the Fremont, Elkhorn & Missouri Valley Railroad Company, situated in said Douglas county, as shown on the plat and profile of said railroad as submitted to us by the agent of said railroad company, and on file in the county court for Douglas county, Nebraska, viz.:

"A strip of ground across the real estate in the _____ and described as follows: The south half of the northeast quarter of the southeast quarter of section thirty-six (36), in township fifteen (15) north, of range twelve (12) east, of the sixth principal meridian, being a strip of land one hundred feet in width, it being fifty (50) feet in width on each side of the center line of said railroad as surveyed, staked out, and located over and across the premises above described, all as is shown by the plat hereto attached,

marked 'A,' and made a part hereof, and belonging to Claus Mattheis, having been duly qualified, and having each personally examined said premises on the 10th day of June, 1887, at the hour of 10 A. M., being the day and the time mentioned in the notice filed with the county judge, at the office of said county judge, in said county, and attached hereto, find the quantity of land taken, and the value thereof, as follows, to-wit: one and $\frac{60}{100}$ acres of land at \$600 per acre, amounting to the sum of \$960, and we hereby accordingly award and appraise the damages to the said owners thereof at the total sum of nine hundred and sixty and $\frac{60}{100}$ dollars."

The amount named in the report, to-wit, \$960, was deposited by the defendant below with the county judge for plaintiff's use before entering upon the premises. The latter, being dissatisfied with the amount assessed in his favor, undertook to appeal to the district court, and filed therein a transcript of the condemnation proceeding, but failing to give the bond required by law or have summons issued was dismissed for want of prosecution. Proof of the above proceedings having been made at the trial, the court on its own motion gave the following instructions, to which exception was taken:

"I. That the award made by the appraisers of the value of the land, and the return thereof into the county court, the record of which has been introduced in evidence, is binding upon the parties hereto, and that question is not and cannot be a subject of inquiry by you.

"II. The appraisers not having made any estimate of the damages which the plaintiff sustained by reason of the depreciation in value of the remainder of his land not taken for right of way nor for the destruction of the crop of vegetables growing upon his land at the time of its appropriation by the defendant, you will allow the plaintiff such damages for such items as the testimony satisfies you he has sustained, not exceeding the amount claimed in the petition therefor."

It is contended by counsel for plaintiff in error that the court, having found the condemnation proceeding to be valid, should have directed a verdict in its favor on the ground that the statutory remedy for the assessment of damages in such cases is exclusive. In this claim counsel are sustained by the decisions of this court. In *R. V. R. Co. v. Fink*, 18 Neb., 82, it is held that "The statutory mode of acquiring the right of way and ascertaining the damage therefor is exclusive as to the manner of assessing the value of the land taken with damage to the residue of the tract, but does not include damage to the possession by the wrongful entry upon the land before condemnation." This case is not claimed by defendant in error to be within the exception noted above, and from an inspection of the petition it is apparent that it is not. Counsel for defendant in error contend that the remedy by condemnation is not exclusive in this case, and we have devoted considerable time to a re-examination of the question. A second investigation has satisfied us of the soundness of the rule stated in *R. V. R. Co. v. Fink*, and that this case is within both the letter and reasoning thereof. That case is in harmony with the views of all text writers and certainly of a great majority of well considered cases on the subject. The following may be cited as among the many authorities in point: *Pierce on Railroads*, 178; *Mills on Eminent Domain*, sec. 87; 1 *Rorer on Railways*, 335; *Daniels v. N. W. R. Co.*, 35 Ia., 129. In 6 *Am. & Eng. Ency. of Law*, 604, it is said "The special remedy provided by statute for determining the compensation for property taken is not cumulative but exclusive, but where the company alone can take the initiative, the land-owner will not be deprived of his right of action at common law." In a note to the first proposition the author cites as supporting the text cases from eighteen different states.

It is next insisted by counsel that the petition for condemnation was not sufficient to give the county judge juris-

diction, hence the rule above stated is not applicable. The statutory remedy is as available to the defendant in error as to the railroad company. And if the condemnation proceeding is void for want of jurisdiction we can see no reason, either upon principle or authority, why the defendant in error should not be required to pursue the remedy specially provided for the ascertainment of his damage. But we think the county judge had jurisdiction.

The objection made to the petition is that the description of the land is not sufficiently specific. The allegation of the petition is "The right of way one hundred feet wide over, across, and through the * * * northeast quarter of the southeast quarter of section No. thirty-six, township No. fifteen, range No. twelve east, * * * all of the above described property being fully described and marked by red lines upon the plat hereto attached and marked Exhibit B and made a part hereof. The following named persons have and claim title, ownership, and interest in the above described real estate, to-wit, * * * C. Mattheis." The exhibit named is a plat of the premises, showing the location of the right of way, but not having marked thereon any notes showing the courses and distances. The notice served upon defendant in error describes the property to be condemned as follows: "A right of way one hundred feet wide over, across, and through the northeast quarter of the southeast quarter of section thirty-six, township fifteen, range twelve east, all as surveyed, staked out, and located on said land, all as more fully appears from the petition on file," etc. The report of the commissioners describes the property substantially as above.

The cases cited by defendant in error upon this question arose mostly under statutes which required an accurate description of the boundaries by monuments, etc. In *Vail v. Morris & Essex R. R.*, 21 N. J. L., 189, and *Nat. Dock, etc., Co. v. State*, 21 Atl. Rep. [N. J.], 570, the statute

required the commissioners to transmit with their award a description of the land, the quantity taken, by whom owned, how situated and bounded, and described in writing, to be filed in the clerk's office and there kept as a public record." It is obvious that a technical description is contemplated by this provision. The description in this case is quite as definite as in *K. C. R. Co. v. Story*, 10 S. W. Rep. [Mo.], 203, where, under a statute requiring a specific description, it was held sufficient. In *Kuschke v. St. Paul*, 47 N. W. Rep. [Minn.], 786, Chief Justice Gilfillan says: "The notice was not for the information of strangers to the property fronting on the street, but of owners and persons interested in it. If it contained enough in connection with what they already had notice of to apprise them what property was to be taken, the purpose of the notice was accomplished." We are satisfied to follow these authorities. The proceeding under our statute is exceedingly informal, and while it must not be lacking in any essential to the jurisdiction of the commissioners, we have no occasion to follow the decisions under statutes which prescribe conditions to the exercise of the right of eminent domain not found in ours. We agree with counsel that a condition to the application of the rule above stated is that the railroad company must act in good faith. A corporation cannot in this way acquire property for any other purposes than those enumerated in the statutes, and if it attempted to do so the land-owner would have his election of remedies. There is nothing in this record, however, from which to impugn the motives of the company. The evidence in the record discloses that the road was built and we have no right to presume that the land is now used for any other purpose than that for which it was condemned.

Lastly, it is urged that it does not appear that the parties cannot agree upon the compensation. The testimony of the defendant in error does not sustain the claim. It

Cunningham v. Fuller.

is apparent that he could not agree with the agent of the company who had the matter of right of way in charge. The court erred in giving the instructions set out and in not directing a verdict for the defendant below, for which the judgment must be

REVERSED.

THE other judges concur.

DENNIS CUNNINGHAM V. FRANCIS C. FULLER.

[FILED JUNE 30, 1892.]

1. **Evidence: DECLARATIONS AS TO TITLE.** The declarations of a person in the possession of property, as to his title, are admissible evidence against him and all persons claiming under him.
2. ———. *Held*, That certain testimony set forth in the opinion was improperly rejected.
3. **An instruction asked by a party which conforms to the proof introduced by him should be given.** A party is entitled to have his case submitted to the jury upon his theory as shown by the evidence.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Cowin & McHugh, for plaintiff in error, cited, that the declarations of Duncan as to the ownership of the property should have been received: *Dorsey v. Dorsey*, 3 H. & J. [Md.], 506; *Strickler v. Todd*, 10 S. & R. [Pa.], 63; *Jackson v. Davis*, 5 Cow. [N. Y.], 123; *Bird v. Smith*, 8 Watts [Pa.], 434; *Waring v. Warren*, 1 Johns. [N. Y.], 340; *Ivat v. Finch*, 1 Taunt. [Eng.], 142; *Stewart v. Cheatham*, 3 Yerg. [Tenn.], 60; *Smith v. Montgomery's Adm'rs*, 5 Mouroe [Ky.], 502; *Forsyth v. Kreakbaum*, 7 Id., 97;

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| 35 | 58 |
| 44 | 888 |
| 35 | 58 |
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Guy v. Hall, 3 Murphy [N. Car.], 150; *Johnson v. Patterson*, 2 Hawks [N. Car.], 183. .

C. A. Baldwin (*F. L. Weaver* with him), *contra*, cited: 1 Greenl., Ev., secs. 109, 110.

MAXWELL, CH. J.

This is a contest over a building. The plaintiff alleges that he purchased the building for \$1,300 and paid \$100 in cash; the remaining \$1,200 being debts against the building which he assumed; that the building had been used for a saloon, and the plaintiff designed to continue the use of it for that business; that one Ennis had been in the saloon before the plaintiff purchased it and one Duncan had an interest in the business, and the \$1,200 were to be paid out of the receipts of the saloon, upon the payment of which Duncan was to own one-third of the building and Ennis one-third, the remaining third to be in the plaintiff; the title, however, to remain in the plaintiff until such payments were made. The common source of title was Gromer & Yates. The defendant contends that Gromer & Yates sold the property to Duncan, from whom the defendant purchased it. None of the transactions between the plaintiff Ennis and Duncan were reduced to writing. On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The plaintiff introduced testimony in support of his theory of his case, and that the building had been used as a saloon for some five or six months after the arrangement above spoken of was made, and about \$600 of the indebtedness had been paid, when the custom of the saloon fell off and the business was unprofitable and both Ennis and Duncan quit the saloon. Soon after this Duncan made a bill of sale of the property in controversy to the defendant, and upon this bill of sale he bases his claim of title to the property.

On the trial of the cause the plaintiff offered "to prove by the plaintiff that subsequent to the time when this witness went into possession of the property, as testified to by him, and after the \$600 were paid, as testified by him, out of the proceeds of the business of this saloon upon the debts assumed, as testified by him, that he, George W. Duncan, in a conversation with this witness, admitted that he would become the owner of one-third of the property in controversy when the debts so assumed were paid out of the proceeds of said business." This was objected to on behalf of the defendant, and the objection sustained, to which exceptions were taken. In this we think the court erred. The declarations of a person in the possession of land as to his title are admissible evidence against him and all persons claiming under him. (*Jackson v. Bard*, 4 Johns. [N. Y.], 230; *Dorsey v. Dorsey*, 3 Har. & Johns. [Md.], 426; *Strickler v. Todd*, 10 S. & R. [Pa.], 63; *Jackson v. Davis*, 5 Cow. [N. Y.], 123; *Corbin v. Jackson*, 14 Wend. [N. Y.], 619; *Bird v. Smith*, 8 Watts [Pa.], 434.) This principle is applicable to personal property (*Durham v. Shannon*, 116 Ind., 403), and was recognized by this court in *Campbell v. Holland*, 22 Neb., 587.

Second—The plaintiff offered to prove that, by the terms of the agreement between the plaintiff Ennis and Duncan, the plaintiff was to be personally and exclusively responsible for all that portion of the \$1,200 indebtedness referred to which would not be paid off by the proceeds of the saloon business. This offer was objected to and the testimony excluded. In this we think the court erred. The plaintiff should be permitted to offer such proof as he may have in support of his theory of the case. The contract being verbal, the proof necessarily must be so, and the court should permit full inquiry into the facts of the case.

Third—The plaintiff asked the court to give the following instruction: "The court instructs you that if you

believe from the evidence in this case that the property in question was purchased from Gromer & Yates by Dennis Cunningham, John Ennis, and George W. Duncan, under the agreement that the ownership of the property in question was to be and remain in Dennis Cunningham until the proceeds of the business carried on with the property should pay the debts thereof, and if you further believe from the evidence in this case that said proceeds of said business did not pay the debts thereof before the bringing of this suit, then and in that case Dennis Cunningham was, at the time of bringing this suit, the owner of the property in controversy." This was refused, to which exceptions were duly taken. In this we think the court erred. This instruction conformed to the plaintiff's theory. He had introduced proof in support of this view of the case, and the jury should have been told directly what the effect would be if they found this evidence to be true. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 61 | 753 |

THE OMAHA AUCTION & STORAGE CO. ET AL. V. HARRIET ROGERS.

[FILED JUNE 30, 1892.]

1. **Opinion Evidence: VALUE.** A person who has a general knowledge of the value of household goods may testify as to such value although he may not have dealt in goods of that kind. (Rogers on Expert Testimony, sec. 152.)
2. **Mortgages: SATISFACTION: CONVERSION BY MORTGAGEE.** A mortgagee, after due notice, may sell a sufficient amount of the

mortgaged property to satisfy the mortgage debt; but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess.

3. Instructions, set out in the opinion, *held*, to be a correct statement of the law.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Cavanagh & Thomas, for plaintiff in error, cited: *Engster v. State*, 11 Neb., 542; *Holmes v. Bailey*, 16 Id., 305; *Ahlman v. Meyer*, 19 Id., 68; *Holmes v. Bell*, 3 Cush. [Mass.], 322; *N. E. Mtg. Sec. Co. v. Aughe*, 12 Neb., 506; *Perkins v. Conant*, 29 Ill., 184.

J. W. West, *contra*, cited: *Charter v. Stevens*, 3 Denio [N. Y.], 33.

MAXWELL, CH. J.

This action was brought by the defendant in error to recover from one Octave Bouscaren the value of certain household goods sold under an alleged foreclosure of a chattel mortgage. The plaintiffs in error (defendants below) alleged in their answer that the goods were sold under a chattel mortgage executed by Mrs. Rogers to one named Conalline, which mortgage was assigned to Bouscaren. Mrs. Rogers in her reply alleges usury in the transaction in which the chattel mortgage was given, and a tender of the amount lawfully due thereon prior to the sale. The cause was submitted to a jury, which returned a verdict in favor of Mrs. Rogers for the sum of \$408.02, upon which judgment was rendered.

The chattel mortgage is as follows:

"This indenture, made the 25th day of June, A. D. 1888, between Mrs. G. C. Rogers, party of the first part, and G. Conalline, party of the second part,

"Witnesseth, That said party of the first part, in con-

sideration of \$97.50 in hand, has bargained and sold, and by these presents do grant and convey, unto the said party of the second part the following described goods, chattels, and property, to-wit: One bedroom set, composed of marble top, black walnut, washstand, dresser, and bed; three oil paintings; one marble top center table; one large mirror; one upholstered black walnut sofa; one upholstered rocking chair; one black walnut upholstered arm chair; one cane rocking chair; one bronze clock; one set antique oak bedroom furniture, composed of bed, washstand, and dresser, together with all chairs, bedding, etc.; one No. 3 Silvia stove, not sold; and all carpets, ornaments, rugs, and personal property of any description contained in the house known as 1211 Dodge street, Omaha, Nebraska, and agreed to be kept on such premises; together with all the appurtenances and all the estate, title, and interest of the said party of the first part therein.

“The condition of the above sale is such, that whereas the said party of the first part has executed and delivered to the said party of the second part certain promissory note of even date herewith, payable in ninety days, and bearing interest at the rate of ten per cent per annum after maturity:

“Now if the said party of the first part shall well and truly pay unto the said party of the second part the said note and interest thereon according to the tenor and effect thereof, then this conveyance shall be void; otherwise to be and remain in full force and effect. But in case the said party of the first part shall fail to pay the full amount of said promissory note, principal and interest, according to the tenor and effect thereof, then, in that case, the said party of the second part is hereby authorized and empowered to take possession of the above described property and sell the same at public sale, after giving twenty days' notice of such sale by advertisement thereof in some newspaper published in said county of Douglas; and after pay-

ing all the costs, charges, and expenses of every nature incurred in and about the collection of said note, shall apply the remaining proceeds of said sale in payment of said note, principal and interest, and pay over the surplus, if any there be, to the said party of the first part.

"It is hereby expressly agreed that the said party of the second part shall have the right at any time, at his election, to take possession of the above described property and hold the same.

"Witness my hand the day and year first above written.

"MRS. G. C. ROGERS.

"In presence of

"O. BOUSCAREN."

The goods were sold under mortgage on the 23d of April, 1889.

The testimony of Mrs. Rogers is that she borrowed \$75 from Bouscaren and executed a note and mortgage to him for \$97.50, due in three months, that she made various payments during the ensuing nine months, amounting in all to \$69. Bouscaren testifies that he made the loan, that he was not certain as to the exact amount, but he thought he loaned \$90. He admits that in any event the loan was grossly usurious. He also admits receiving \$65 as payment on the debt before the foreclosure of the mortgage. The note and mortgage seem to have been taken in the name of Conalline to enable Bouscaren to claim that he was an innocent purchaser thereof.

The first objection made by the plaintiff in error is that Mrs. Rogers was not competent to testify as to the value of the goods. It is true she was not dealing in goods, but her testimony shows that she was acquainted with goods of this character and knew something of their value. Her first statement as a witness was that she knew the value of the goods, and her cross-examination failed to show that she did not possess sufficient knowledge to testify as to their value. Her testimony is fair, and while she did not

profess to be a dealer in second-hand goods she did show a sufficient knowledge to entitle her to testify as to the value. (Rogers on Expert Testimony [2d Ed.], sec. 152.

Second—It is claimed that there was no conversion of the goods shown. We think differently, however. It is admitted that considerable more goods were sold than were necessary to satisfy the debt. Where such is the case, the mortgagee is liable for the conversion of the goods so unnecessarily sold. (*Charter v. Stevens*, 3 Denio [N. Y.], 34.)

Third—Objections are made to instructions 1 and 2 given by the court on its own motion. The instructions, however, should be considered as a whole, and when so considered, they are unobjectionable. They are as follows:

“This action is brought by the plaintiff to recover damages which she claims to have sustained by reason of the alleged wrongful conversion by the defendants of the property of the plaintiff. The defendants allege as a defense to the action:

“First—That the goods, for the alleged wrongful conversion of which this suit is brought, were stored with the defendant. The Omaha Auction & Storage Company was to have a first lien on the goods for storage charges, and that such charges were not paid, except the sum of \$2.

“Second—That a chattel mortgage had been given by the plaintiff to one G. Conalline, which had been assigned to O. Bouscaren, who took possession of the property and sold the same at public auction; that the defendant Creighton acted as the auctioneer at said sale, and that the proceeds of the sale were applied to the payment of the balance due for storage of the goods to the Omaha Auction & Storage Company and to the expenses of the sale, and to the amount remaining due under the mortgage, and that the goods sold for all they were worth.

“The plaintiff for reply admits that the goods were sold under a chattel mortgage, but she alleges that the mortgage was given by her to secure a loan of money made by de-

Omaha Auction & Storage Co. v. Rogers.

fendant Bouscaren to her, and that for said loan the defendant Bouscaren received a greater rate of interest than was allowed by law, and that of the amount so loaned no more than the sum of \$6 remained due thereon at the time of sale, and that such sum was tendered to the defendant before the sale, and that the amount due for storage of the goods with the Omaha Auction & Storage Company had been tendered to such company before the sale.

“You are instructed:

“I. It will be your duty to inquire, First, whether or not there was usury in the transaction between the plaintiff and Bouscaren; and if you find, under the testimony, there was usury, then he, Bouscaren, would be entitled to claim under his mortgage only the amount he had actually loaned to the plaintiff without interest, and she, the plaintiff, would be entitled to claim as a credit upon such amount of principal any payments which she may have made.

“II. Upon the basis above given in the previous instruction, you will ascertain from the testimony the amount which was due to Bouscaren at the time of the sale under his mortgage, and to satisfy such amount, with the expenses of the sale, he, Bouscaren, was entitled to sell so much of the goods covered by the mortgage as was necessary for that purpose. But if he sold any more of such goods than was necessary to satisfy the amount legally due him under his mortgage, with the expenses of the sale, he would be liable for the fair market value of such goods so sold in excess of the amount required in this action.

“III. If you shall find from the testimony that any amount which may have been due for storage of the goods to the defendant, the Omaha Auction & Storage Company, was tendered by the plaintiff to the company or its agent, then the defendants were not justified in selling the goods for such charge for storage, provided you find from the testimony that such tender was kept good by the plaintiff

by retaining the same for such company, and so notifying it that the amount was subject to its demand.

“IV. If, under the foregoing instructions, you find for the plaintiff, you will ascertain from the testimony the fair market value of such of the goods as were sold after a sufficient amount had been realized to satisfy the amount due under the chattel mortgage, with the expenses of the sale, and upon that amount compute interest at the rate of seven per cent per annum from the date of the commencement of this action, to-wit, May 23, 1889, up to the first day of this term, September 22, 1890.

“V. You are instructed that under the laws of this state, as provided by statutory enactment, where a note is given for a loan of money, and for the use thereof a sum of money is received, reserved, or contracted for by the lender exceeding a rate of ten dollars per year upon one hundred dollars, then such a note is an usurious contract and the lender can only recover the principal without interest, and if any interest shall have been paid by the borrower thereon, then the sum or sums so paid are to be credited upon the principal.

“Second—If you find from the evidence that the chattel mortgage under which defendants justify themselves in the sale of the goods in controversy was given to secure an usurious note, as defined in these instructions, and if you further find from the evidence that plaintiff has paid any sum or sums thereon as interest or otherwise, and if, after deducting said sum or sums of money so paid, if any such there were, from the sum of money which plaintiff actually received upon said note, you find that there was still a balance due upon said note, and if you further find that defendants, in selling said goods under said chattel mortgage, sold the same in parcels, then, upon such a state of facts, the court instructs you that after having sold such a part of said goods as realized a sum of money sufficient to pay any such balance, if any such there was, together with all

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costs incurred in keeping, advertising, and selling said goods, then the said mortgage lien was extinguished as to the goods remaining unsold, and the selling of other of said goods under said chattel mortgage was in law a conversion of the same, for the value of which defendants are liable to plaintiff."

It is contended on behalf of the plaintiff in error that the question of usury can be raised only in an action to collect the interest. The statute does not prescribe the nature of the action in which the defense of usury may be made and the court has no right to do so. The defendant took possession of the goods and was entitled to a sufficient amount to satisfy his legal claim for the money loaned and no more. He took possession and sought to appropriate all the property to his own use. The amount of his claim is put in issue by the pleadings and testimony received thereunder and was properly submitted to the jury. The right to sell for the storage is not claimed by the plaintiff in error. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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|-----|-----|
| 35 | 08 |
| 39 | 483 |
| 35 | 08 |
| 141 | 223 |
| 35 | 08 |
| 42 | 45 |
| 42 | 360 |
| 35 | 08 |
| 147 | 842 |
| 35 | 08 |
| 50 | 340 |

CITY OF OMAHA V. FREDERICKA JENSEN.

[FILED JUNE 30, 1892.]

1. **Municipal Corporations: UNSAFE STREETS.** Where an excavation is made in a public street under contract with the city authorities, such city cannot shift the responsibility for keeping its streets in a safe condition onto a contractor and thus relieve itself from liability for neglect to erect proper barriers to prevent accidents by falling into such excavation. It may no doubt require a contractor to indemnify it against loss occasioned by such accidents.

2. ———: ———: NOTICE. Where a city causes an excavation to be made in a public street it cannot plead want of notice of the failure to erect barriers to prevent accidents by falling into the excavation. It is its duty to see that such barriers are erected and kept up.
3. Evidence: TESTIMONY OF ABSENT WITNESS AT FORMER TRIAL. Where a witness has testified on a former trial of the case, and his testimony reduced to writing in open court by the stenographic reporter, and the witness is absent from the state, such testimony, if otherwise competent, is admissible in evidence; and an objection "that no sufficient cause has been shown for the reading of that testimony" is not an objection to the mode of certifying the same, and was properly overruled.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

A. J. Poppleton, for plaintiff in error:

The court erred in refusing the instruction asked. (*Dillon, Munic. Corp.*, sec. 1015; *Craig v. Sedalia*, 63 Mo., 417; *Brown v. Glasgow*, 57 Id., 157; *Cooley, Torts*, 745 and cases cited.) The court erred in admitting the testimony of Nels Christensen. (*Spielman v. Flynn*, 19 Neb., 346.)

Connell & Ives, contra:

The city is not relieved of its liability by virtue of its contract with Thompson, the contractor. (*Palmer v. Lincoln*, 5 Neb., 137; *Lincoln v. Walker*, 18 Id., 248; *McAllister v. Albany*, 23 Pac. Rep. [Ore.], 845.) No notice, either actual or constructive, of the dangerous condition of the street is required. (*City of Birmingham v. McCrary*, 4 S. Rep. [Ala.], 630; *Brusso v. Buffalo*, 90 N. Y., 679; *Hanniford v. Kansas*, 15 S. W. Rep. [Mo.], 753; *Springfield v. Le Claire*, 49 Ill., 476; *Chicago v. Johnson*, 53 Ill., 91.) There are three fatal objections to the consideration of the alleged error relating to Christensen's testimony: It was not pointed out during the trial. It was not even in

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the most remote and general way embraced in the motion for a new trial. It is not assigned in the petition in error. (*Dietrichs v. R. Co.*, 13 Neb., 48; *R. V. R. Co. v. Hayes*, Id., 491; *Yates v. Kinney*, 25 Id., 122.)

MAXWELL, CH. J,

The defendant in error brought an action against the city of Omaha to recover for personal injuries caused by falling into an excavation in that city, which was negligently left without guards or other protection. The city pleads two defenses: First, that the injury was caused by the negligence of the party injured; and, second, that the sewer trench described in plaintiff's petition was at said date being constructed under a contract made to the lowest bidder as provided and required by the charter of the city of Omaha in that regard, and under and by virtue of the terms of said contract the contractor was to erect and maintain the necessary guards, signals, and protection on and around said work, so as to prevent the danger of accidents to travelers upon the street, and that under and by virtue of the terms of said contract, the defendant, the city of Omaha, had nothing whatever to do with the maintaining of such guards, signals, and protections, and the defendant further saith that it had no knowledge, directly or otherwise, that the contractor was not maintaining the necessary and proper guards, signals, or protection, and that the defendant did not have notice that such signals, guards, or protections were not maintained by said contractor." On the trial of the cause the jury returned a verdict in favor of Mrs. Jensen for the sum of \$2,000, on which judgment was rendered.

It is contended, first, that the city was not liable, for the reason that the proof shows that it had expressly stipulated with the contractor that he should place guards around the excavation, and that it had no actual notice of his failure to supply them, and that the danger had not existed a suf-

ficient length of time to charge the city with the implied notice. The attorney for the city thereupon requested the court to give the following instruction: "The jury are instructed that under the terms and conditions of the contract, introduced in evidence by the defendant, under which the sewer was being constructed, the city is not liable in damages to the plaintiff for the failure of the contractor to place or maintain guards or signals, unless you find from the evidence that the city, by and through its officers, had actual knowledge that guards or signals were not put up over the sewer as a warning to travelers on that part of the street. Whereas this sewer trench had been dug on the very day of the happening of the accident, you are instructed, as a matter of law, that the want of signals or guards upon that evening had not existed for a sufficient length of time to constitute constructive or presumptive notice to the city that the sewer was left unguarded and unprotected, so there could be no recovery in this case unless the plaintiff has proven that the city, through its proper officers, did have actual knowledge that the contractor had omitted to put up the proper signals or guards, and that after such knowledge had come to the officers or its proper agents, they had length of time to see that the same were put up before the accident happened. You are further instructed that the plaintiff does not claim to have introduced any evidence to prove that any officers of the city of Omaha had any actual knowledge that guards and signals were not put up by the sewer trench, you should therefore find for the defendant." This the court refused to give, to which exceptions were duly taken. In this there was no error. Where the injury is the result of the work itself, however skillfully performed, and not in the manner of performance, the city will be liable for an injury sustained by a party in the exercise of due care; in other words, where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees or is authorized

to do, the person who causes the obstruction or defect will be liable. Thus, suppose the city caused a ditch to be dug across the street and the same should be left open and unguarded, the city cannot plead as a defense that the contractor agreed to keep guards around the excavation, because it cannot surrender its control of the streets so as to relieve it from liability. (*Palmer v. City of Lincoln*, 5 Neb., 136; *McAllister v. Albany*, 23 Pac. Rep. [Ore.], 845; *Storrs v. Utica*, 17 N. Y., 108; *Robbins v. Chicago*, 4 Wall. [U. S.], 679; *Circleville v. Neuding*, 41 O. St., 469.)

In the case last cited it is said: "The relation between the city and Barndt was clearly that of employer and independent contractor, and the rule is generally that for injuries occurring in the progress of work carried on by parties in that relation, the contractor alone is liable. But this liability is limited to those injuries which are collateral to the work to be performed and which arise from the negligence or wrongful act of the contractor or his agents or servants. Where, however, the work to be performed is necessarily dangerous, or the obligation rests upon the employer to keep the subject of the work in a safe condition the rule has no application. This distinction has been taken in this state in a number of cases: *Carman v. Railroad Co.*, 4 O. St., 399; *Tiffin v. McCormack*, 34 Id., 638; *Hughes v. Railway Co.*, 39 Id., 461; and elsewhere in *McCafferty v. Railroad Co.*, 61 N. Y., 178; *Prentiss v. Boston*, 112 Mass., 43; *City of Logansport v. Dick*, 70 Ind., 65; *Crawfordsville v. Smith*, 79 Id., 308; *Robbins v. Chicago*, 4 Wall. [U. S.], 657.

In this case the cistern contracted for was to be built in a street, and to be eighteen feet wide and twenty feet deep. Such an excavation in a street, unless protected to guard persons and animals using the street from falling into it, was necessarily dangerous. The city was under the statutory obligation at the time of the accident to keep its streets open, in repair, and free from nuisance, and it could not

cast this duty upon a contractor, so as to relieve itself from liability to one who should receive an injury. It is primarily liable for an injury resulting from such dangerous place in a street. No doubt a city may require a contractor to indemnify it against loss for damages caused by his negligence in the performance of the work, but that question is not before us.

Second—It is claimed the city is not liable, because it had no notice, either actual or constructive. In a case of this kind no notice is necessary. The city had authorized the excavation in question and it was its duty to see that the proper guards were placed around it.

Third—It is claimed that the court erred in admitting the testimony of Nels Christensen. It appears from the record that Christensen's testimony had been taken by the court's stenographic reporter on a former trial of this case. This testimony was objected to "for the reason that no sufficient cause has been shown for reading that testimony." The objections were overruled and the testimony admitted. In this it is claimed there is error, and we are referred to the case of *Spielman v. Flynn*, 19 Neb., 342. In that case it was held that a certified copy of the stenographic reporter's record of proceedings in the district court is admissible in all cases where the original would be. That, we think, is a correct statement of the law on that point. In the case at bar Christensen is shown to have been absent from the state, and his testimony on a former trial, if otherwise unobjectionable, is admissible. The objection is not to the mode of certifying the evidence. Had it been, as the stenographic reporter was present in court, no doubt he would have made the proper certificate. The objections were properly overruled. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CHRISTIAN F. HAMAN V. THE OMAHA HORSE RY. CO.

[FILED JUNE 30, 1892.]

1. **ASSAULT: WORDS OF PROVOCATION** alone will not justify an assault, although they may constitute a ground of mitigation of damages.
2. ———: **STREET RAILWAYS: IN EJECTING A PASSENGER** from the street car the conductor can use no more force than is necessary for that purpose, and if he do so the company will be liable.
3. ———: **MEASURE OF DAMAGES.** The rule as to the measure of damages as stated in the tenth paragraph of the instructions in *McClure v. Shelton*, 29 Neb., 374, 375, approved.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

C. A. Baldwin, for plaintiff in error:

The company is liable for the act complained of (*McKinley v. R. Co.*, 44 Ia., 314; *Goddard v. R. Co.*, 57 Me., 202; *Hanson v. R. Co.*, 62 Id., 84; *Bryant v. Rich*, 106 Mass., 180; *N. W. R. Co. v. Hack*, 66 Ill., 238; *Oraker v. R. Co.*, 36 Wis., 657; *Smith v. R. Co.*, 23 O. St., 10; *Rounds v. R. Co.*, 64 N. Y., 129; *Peck v. R. Co.*, 70 Id., 587; *Shea v. R. Co.*, 62 Id., 180.)

Geo. E. Pritchett, contra:

If the assault was as claimed, the defendant is not liable, because the same was a willful trespass and entirely outside the driver's employment. (*McManus v. Crickett*, 1 East Term [Eng.], 106; *Isaacs v. R. Co.*, 47 N. Y., 123; *Towanda Coal Co. v. Heeman*, 86 Pa. St., 418; *Coleman v. R. Co.*, 106 Mass., 174.) A new trial may not be granted on account of the smallness of damages. (*Shoff v. Wells*, 1 Neb., 168.)

MAXWELL, CH. J.

This is an action to recover for personal injuries inflicted upon plaintiff by one of defendant's employes, who at the time was in charge of one of defendant's cars, as driver and conductor thereof, and upon which car plaintiff had taken a seat as a passenger thereon, his fare having been paid by a fellow passenger. The plaintiff says that after he had so taken a seat in defendant's car, and after his fare was so paid, the driver demanded of plaintiff that he personally pay a fare, over which demand some words were had between them, and the plaintiff threatened to report the driver and his conduct to the superintendent of the railway; that thereupon the driver made an assault upon the plaintiff, striking him with great force while plaintiff was so seated in the car, and at the same time shoving plaintiff's head through the glass of one of the windows of the car; that plaintiff undertook to and did leave the car, and the driver followed him for quite a distance from the car, pounding plaintiff with a club until he was stopped by some laborers near by. And he says that the assault so made upon him, and the injuries inflicted, caused him great pain of body and mind, and disgrace and humiliation, for which he asks judgment for damages. The defendant in its answer denies the assault and battery, and at the same time pleads justification for the conduct of its driver. On the trial, the jury returned a verdict in favor of the plaintiff for the sum of ten cents, upon which judgment was rendered.

There is but little conflict in the testimony, except upon the point whether the plaintiff used any abusive language to the driver. The plaintiff was the inspector of paving and curbing and other public improvements in the city of Omaha, and he, with Mr. Fox, a contractor, entered the Cuming street car at the turn-table on Thirty-sixth street. He testifies:

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Mr. Fox stepped on the car first and I followed him. He walks up before sitting down—up to the box—and puts in some money, whatever it was I could not swear, but he put in some money. I took my nickel out and followed him right up and when I come to put it in he says, "Hold on, I paid your fare." So we both walked back and sat down. I sat on the rear end next to the door and Mr. Fox sat right next to me on the south side. So the driver stopped by that time his car, and he ties his lines and he comes in and sat down and talked to a girl who brought up a little bit of a girl about fifteen years of age probably, and he had some conversation with her that was not very decent for a driver in a car. There was another lady with a child of about twelve or thirteen years in there, but there was nothing said about it until he finally drove off.

Q. Which way did he drive?

A. He went east. Then he came down about to where the switch was at that time—there is a double track now—about Thirty-third street. I said to Mr. Fox, "Are you sure you paid my fare?" Then he says, "Do you think I would tell you if I didn't?" I says, "He is ringing the bell for somebody." Well, we sat a little while longer and he rang the bell again. Then he went up—Mr. Fox went up and had some talk with him—the door was open, and he had his head on the outside towards the driver. What he talked—the first part—I could not hear it; but finally he came in and he took out another dime. He says, "Here is another dime, I will put that in, and after looking in the box to see if it is in there so you will be sure about it." That was all that was said, and he came back and sat down, and he put the dime in the box and the driver satisfied himself it was in the box. Then he came back and sat down. I says, "Did you pay for both of us?" He says, "Yes." He says, "He denies that I paid anything at all." So I walked up to the driver. I says, "You deny that man

paid you any money when he got on the car?" He says, "Yes, neither you or him." I says, "I know I did not, but that man paid you some money." He says, "No, he didn't." I says, "I know better; I am going to report you to Mr. Smith as soon as I get down town." That is all I said, and went back and sat down. He says, when I walked back, "I do not give a damn for you or Smith; I am running this car; it is all right."

In this he is corroborated by the testimony of Mr. Fox. Their testimony clearly shows that upon entering the car Mr. Fox deposited ten cents in the box for himself and the plaintiff. The driver, however, insisted, after starting the car, that they had not paid, and, apparently to avoid any difficulty, they paid a second time. There is no doubt this is the case.

The driver was called as a witness on behalf of the company and testified as follows:

Mr. Fox came out to the front of the car to me and asked if I was ringing for him. I said, "Yes, put your fare in the box." "Well," he says, "we have paid our fare." "No, sir," I says, "you did not." I guess he forgot all about it. Well, he went back in and did not say a word. He went back and spoke to the other gentleman behind, and he came in to the front of the car and he says to me, he says: "You son of a bitch, I will report you to Smith, and he dropped a dime in the box."

Q. This man here?

A. Yes, and then he went back and sat down in the southwest end of the car and Fox stood on the rear platform. There were three ladies in the car and a child at the time and I stopped the car and went back and told them they could not speak such language as that in the car in the presence of ladies, they could not ride here and do that. I says, "Get out of here." So I took them by the collar of the coat or the vest rather, and was taking him out on the back platform of the door, by the collar, when he hit

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me on the nose, and Mr. Fox was standing on the platform also, and he hit me in the back of the head, so I pulled both of them out in the street, both of them, and we got in a fuss on the street.

Q. Did Fox sit down in the car at all on the trip?

A. No, sir.

Q. I understood you to say that he had put no money in the box at all?

A. No, sir, he did not.

Q. And it was Haman here, the plaintiff here, who put the ten cents in the box after Fox had been up and talked with you about paying fare.

A. Yes, sir.

On his cross-examination he states that the plaintiff called him the objectionable name but once in the car; that he then deposited ten cents in the box and then took his seat; that he remained in his seat "it might be five minutes," when he went into the car and commenced the assault on the plaintiff. A number of witnesses testify that he forcibly ejected both the plaintiff and Fox from the car and struck the plaintiff in the face and followed the plaintiff some distance from the car and struck him with a club, and when remonstrated with by a number of gentlemen who were on the sidewalk, he answered, "Go on about your business or I will give you some." It appears that the same driver, but a short time before, at a point on Cuming street, where a sewer was being constructed and the street consequently obstructed, drove his car in such a manner as to nearly precipitate two members of the board of public works into a sewer, and when remonstrated with by the parties who had just escaped injury, he told them to go to hell. Complaint was made to Mr. Smith, the superintendent, who it seems did not suspend the driver for even a single day, but required him to apologize to the gentlemen who had been insulted, and ask their forgiveness, which, on a promise of better conduct in the future,

was freely granted. The company therefore was apprised of the character of this man, if such notice was necessary.

On the trial the court instructed the jury as follows: "You are further instructed, however, that if you believe from the evidence that the driver, Ed. Kogan, assaulted the plaintiffs, yet, if you further believe from the evidence that the plaintiff invited and provoked such assault, by using profane, vile, and abusive language toward said Kogan, and that the assault and beating complained of were in resentment of such language and caused by it, then in that event you are instructed that the defendant is not liable in damages on account of injuries received by plaintiff under such circumstances, and your verdict should be for the defendant." This instruction is clearly erroneous. All the authorities agree that words of provocation alone will not justify an assault. (*Sorgenfrei v. Schroeder*, 75 Ill., 397; *Ogden v. Claycomb*, 52 Id., 366; *Donnelly v. Harris*, 41 Id., 126; *State v. Griffin*, 87 Mo., 608; *Collins v. Todd*, 17 Id., 537; *State v. Wood*, 1 Bay [S. Car.], 351; *Winfield v. State*, 3 Greene [Ia.], 339; *Birchard v. Booth*, 4 Wis., 67; *Mitchell v. State*, 41 Ga., 527; *Suggs v. Anderson*, 12 Id., 461; *Lee v. Woolsey*, 19 Johns. [N. Y.], 319; S. C., 10 Am. Dec., 230; *Avery v. Ray*, 1 Mass., 12; *Cushman v. Ryan*, 1 Story [U. S.], 91; 1 Am. & Eng. Encyc. of Law, 803.) Where, however, the provocation is recent, it may be shown in mitigation of damages.

Second—But even if the driver had been justified in removing the plaintiff from the car, he would not be protected in using a greater degree of force than was apparently reasonably necessary, and if he did so the company would be liable. In this case the driver's own testimony shows that his conduct was brutal in the extreme, and is not justified by anything that appears in the record.

Third—The court failed to instruct clearly on the measure of damages. In *McClure v. Shelton*, 29 Neb., 374, 375, this court approved an instruction as to the measure

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of damages in case of assault and battery, which, in the main, is applicable to a case like this, with the addition that the party is entitled to compensation for the humiliation of a forcible and violent expulsion from the car. It is not disputed that the company is liable for the acts of its employes in a case of this kind, and if it were, there is no doubt of such liability. (*McKinley v. C. & N. W. R. Co.*, 44 Ia., 314; *Goddard v. Grand Trunk R. Co.* 57 Me., 202; 62 Id., 84; *Bryant v. Rich*, 106 Mass., 180; *N. W. R. Co. v. Hack*, 66 Ill., 238; *Craker v. C. & N. W. R. Co.*, 36 Wis., 657; *Smith v. P. & Ft. W. & C. R. Co.*, 23 O. St., 10; *Rounds v. Del. R. Co.*, 64 N. Y., 129; *Peck v. C. R. Co.*, 70 Id., 587; *Shea v. Sixth Ave. R. Co.*, 62 Id., 180.) The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEO. LEAVITT ET AL. V. E. R. SIZER.

[FILED JUNE 30, 1892.]

1. **Review: OBJECTIONS NOT RAISED BELOW.** Where the clerk of the court and deputy sheriff were interested in the result of the action, and hence in drawing the jury and talesmen, but no objection was made until after the trial, *held*, that the objections should have been presented to the trial court before the trial, otherwise they cannot be considered by the supreme court.
2. **A finding of fact set out in the opinion *held* contrary to the weight of evidence.**
3. **Instructions copied in the opinion *held* to be erroneous.**

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

Leese & Stewart, for plaintiff in error, cited: *Savage v. Stevens*, 126 Mass., 207; *Morgan v. Hardy*, 16 Neb., 427; *Bollman v. Loomis*, 41 Conn., 581; Bigelow, *Frauds*, 496; 2 Herman, *Estoppel*, sec. 1078.

Abbott, Selleck & Lane, contra, cited: *Sycamore Co. v. Grundrad*, 16 Neb., 537; *City of Lincoln v. Holmes*, 20 Id., 47.

MAXWELL, CH. J.

This is an action upon three promissory notes, dated December 17, 1886, one for \$500, due in three years, with interest at ten per cent, payable semi-annually, and two coupon notes, each for the sum of \$25. These notes were secured by a B. & M. land contract for the northwest quarter and west half of the northeast quarter of section 37, township 3, range 15 west. The notes were given to W. A. Selleck and by him indorsed to Sizer.

The defendants below (plaintiffs in error) allege in their answer "that on or about the 17th day of December, 1886, defendants conveyed to plaintiff the following described real estate, situate in Lancaster county, Nebraska, viz.: The west half of the northeast quarter of section 22, township 11, range 6 east, of the value of \$2,000, with incumbrance of \$500; and, in consideration of said conveyance, the plaintiff on said date assigned to defendant George Leavitt a certain contract for the sale of the following described lands of the Burlington & Missouri River Railroad Company in Nebraska with plaintiff, to-wit: The west half of the northeast quarter and the northwest quarter of section 33, township 3, range 15 west, of the value of \$500, and no more, and upon which there was owing from plaintiff to said railroad company, for purchase money under said contract, the sum of \$473, the value of plaintiff's interest therein by him assigned being no more than \$27. In negotiating for the exchange of said

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lands one C. W. Hoxie, a brother-in-law of plaintiff, acted for and on behalf of plaintiff, was plaintiff's duly authorized agent, and his acts as such were by plaintiff approved and ratified. To induce defendants to convey said lands to plaintiff, the plaintiff and said Hoxie, intending to cheat and defraud defendants, falsely and fraudulently represented to these defendants that the said railroad lands in Franklin county, covered by said contract, were of the value of \$10 per acre, and of the aggregate value of \$2,400, and of the value of \$2,000 over and above the sum owing thereon for purchase money, and that the same was good, smooth, tillable land; that said contract was ample and sufficient security for a loan of \$500, and that plaintiff could and would procure a person to make such a loan upon the security of said contract if defendants would convey said Lancaster lands to plaintiff. And further to execute and carry out their said intent to cheat and defraud defendants, plaintiff furnished the money therefor to and procured one W. A. Selleck to make said loan of \$500 to defendants, who falsely pretended for himself to loan the same to defendants upon the faith and credit of a conditional assignment of said railroad land contract as security for the repayment thereof. At the time of making said conveyance and exchange of lands defendants were not acquainted with the value of said railroad lands in Franklin county and had no means of knowing the same, except the aforesaid representations of plaintiff, Hoxie, and Selleck.

"Relying on said representations, and believing them to be true, defendants were induced to and did convey said Lancaster county lands to plaintiff and paid plaintiff \$27, all of the value of \$2,027, for no other consideration than the assignment to them by plaintiff of the executory contract for the conveyance of the aforesaid railroad land in Franklin county, and at the same time defendants executed the note mentioned in plaintiff's petition.

"That said representations of plaintiff, Hoxie, and Sel-

leck, were wholly false as plaintiff well knew; said railroad lands were not of the value of \$10 per acre, nor \$2,400 in the aggregate, nor \$2,000 above unpaid purchase money; was not good, smooth, tillable land, and said W. A. Selleck did not make said loan of \$500 on the faith and security of said contract, but on the contrary said lands were not in fact of greater value than \$2.50 per acre, \$500 in the aggregate, and \$27 above unpaid purchase money due thereon, and was rough, broken by sloughs and canyons and untillable; the said contract did not afford sufficient nor ample security for a loan of \$500 or any other sum, all of which the plaintiff and said Hoxie and Selleck well knew; and fraudulently concealing the same from the defendants the plaintiff by collusion procured said Selleck to make said loan and get defendants' said note therefor for plaintiff's own use and benefit, in pursuance of a concerted and collusive scheme entered into by plaintiff and C. W. Hoxie and W. A. Selleck to cheat and defraud defendants; that by reason of the premises defendants have suffered damages in the sum of \$1,000."

On the trial of the cause the jury returned a verdict in favor of Sizer for the sum of \$594.58, and made special findings as follows:

"First—What was the value of the Franklin county land at the time of the exchange, over and above the amount due the railroad? Five hundred and twenty-seven dollars.

"Third—Did C. W. Hoxie in negotiating the exchange, act in the interest of and in behalf of plaintiff Sizer? Yes; in consummating this exchange.

"Fourth—Did C. W. Hoxie, in negotiating the exchange, act for both plaintiff and defendant? Yes; in consummating this exchange.

"Fifth—Is the Franklin county land rough and untillable? Yes.

"Sixth—Were Sizer and Hoxie, or either of them, in-

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formed, at the time of the exchange, as to the true character of the Franklin land? No.

“Seventh—Did Hoxie do or say anything that would justify Leavitt in believing that the Franklin county land was of sufficient value, above incumbrance, adequately to secure a loan of \$500? Yes.”

It is claimed on behalf of the plaintiffs in error that because Sizer was clerk of the court at the time of the trial and Hoxie deputy sheriff, and as one-half of the jurors were talesmen, that, therefore, the jury was in fact impaneled in the interest of the plaintiff below. Where the officers of the court, particularly those who assist in drawing the jury, are interested in the result of an action, the court should take every precaution to prevent a failure of justice. Unless a trial is conducted in a fair and impartial manner, and before disinterested and unbiased jurors, it is liable to result in a wrong verdict. Constitutional guarantees of a fair trial before an impartial jury would amount to very little unless the courts will give effect to the constitution. A party complaining, however, must bring the matter to the attention of the court at the trial in some of the modes provided by law, otherwise the objections are waived.

The testimony tends to show that Mr. Sizer had visited the land in 1885 and knew that it was rough and untillable and the special finding to the contrary is against the clear weight of evidence. Hoxie professed entire ignorance as to the character of the land, although it is pretty evident that he knew its general character.

Third—The fourth instruction given by the court on its own motion is as follows:

“The jury are further instructed that this action is founded upon a charge of fraudulent representations, made by plaintiff and his agents to defendants; in order to constitute such a fraud within the meaning of the law, it must be clear by a preponderance of evidence that the plaintiff

or his agents intended to commit, and did commit, a fraud upon the defendants in manner complained of in defendant's counter-claim, otherwise the defendant cannot recover upon his counter-claim. The defendant is not entitled to anything upon this counter-claim unless you believe from the evidence that the plaintiff or his agents made the representations alleged; that such representations were false; that the parties making them knew they were false, or had no apparently good reason to believe them to be true; that they were made with the intent to defraud the defendants, and defendants were thereby induced to make the trade in question, and sustained damages by means thereof."

The words "that the defendants are not entitled to recover anything on their counter-claim unless such representations were false, and that the parties making them knew they were false," were liable to mislead the jury. The rule is that where a party without knowing whether his statements are true or false, makes an assertion as to any particular matter upon which the other party has relied and has suffered damages, the party thereby defrauded will be entitled to relief. (*Phillips v. Jones*, 12 Neb., 215; *Smith v. Richards*, 13 Pet., 38; *Trumbull v. Gadlen*, 2 Strobb. Eq., 14; *McFerron v. Taylor*, 3 Cranch, 281.) The court therefore erred in giving this instruction.

The court also erred in giving the following instruction:

"Before you can find for the defendant you must find, either that the plaintiff personally made the representations claimed by the defendant, or that said Hoxie was the agent of the plaintiff, or that he made said representations and that the plaintiff, knowing what representations had been made by said Hoxie, afterwards ratified them."

This instruction is clearly wrong. A principal who retains the benefit of a contract made by his agent thereby adopts all the instrumentalities employed by such agent to effect the contract. In other words, a party cannot retain the benefits derived from the fraudulent conduct of his

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agent without being charged with the instrumentalities employed to accomplish the purpose. (*Rogers v. Emplie Hardware Co.*, 24 Neb., 653; *N. E. Mtge. Sec. Co. v. Henderson*, 13 Id., 574; *McKeighan v. Hopkins*, 19 Id., 33.)

There are other errors which need not be noticed. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CHICAGO, B. & Q. R. Co. v. A. J. GUSTIN.

[FILED JUNE 30, 1892.]

1. **Justice of the Peace: PLEADING: APPEAL.** Where an action is brought before a justice of the peace the plaintiff is required to file a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of the particulars he may claim as a set-off. These are the only pleadings required in an ordinary action before a justice of the peace. Where such action is appealed to the district court, and the answer contains new matter, the plaintiff may follow the procedure in the district court and reply to such new matter.
2. **Evidence: BILL OF LADING** held to have been properly admitted in evidence.
3. ———. There was no conflict in the evidence as to the character of the goods and that they belonged to the fourth class.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

T. M. Marquett, and *J. W. Deweese*, for plaintiff in error:

The reply should have been stricken from the files. (*O'Leary v. Iskey*, 12 Neb., 136; *Courtney v. Price*, Id.,

189; *Dillon v. Russell*, 5 Id., 488; *Williams v. Evans*, 6 Id., 218; Maxwell, Pl. & Pr., 108; *Durbin v. Fisk*, 16 O. St., 534.) As to other points: *Savage v. Aiken*, 21 Neb., 610; *Moore v. Besse*, 30 Cal., 570; *Smith v. Weage*, 21 Wis., 442; *Harris v. Harris*, 10 Id., 468; *Vaughn v. R. Co.*, 9 Am. & Eng. R. Cas. 41; *Hill v. R. Co.*, Id., 21; *Sumner v. R. Co.*, Id., 18; *Little Rock R. Co. v. Daniels*, 32 Id., 479; *Galveston R. Co. v. Kutac*, 37 Id., 470.

C. G. Dawes, contra, cited:

As to the character of a bill of lading: Lawson, Cont. of Carriers, par. 102; *Cincinnati, etc., R. Co. v. Pontius*, 19 O. St., 221; *White v. Van Kirk*, 25 Barb. [N. Y.], 16; *Wolfe v. Myers*, 3 Sandf. [N. Y.], 7; *Maghee v. Camden*, 45 N. Y., 514; *Manhattan Oil Co. v. R. Co.*, 54 Id., 197; *Judson v. R. Co.*, 6 Allen [Mass.], 486; *Mich. Cent. R. Co. v. Hale*, 6 Mich., 243. Admission of bill of lading in evidence: *Neally v. Greenough*, 5 Fost. [N. H.], 325; *Didier v. Auge*, 15 La. An., 398.

MAXWELL, CH. J.

The defendant in error brought an action in replevin against the plaintiff in error, in the county court of Lancaster county, to recover the possession of certain goods. The case was appealed to the district court, and as a point is made on the pleadings, it becomes necessary to set them out. The petition is as follows:

"The above named plaintiff complains of the above named defendant, and for cause of action says that he is the owner of, and entitled to the immediate possession of, the following described goods and chattels, to-wit: one box of iron castings, of a weight of 125 pounds, of the value of \$15; that the said defendant wrongfully and unlawfully detained the said goods and chattels from the possession of the said plaintiff, and has detained the same as aforesaid

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for the space of two days, to plaintiff's damage in the sum of \$50; that said goods were not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of any order of delivery issued under the chapter of the Code of Civil Procedure providing for the replevin of property, or on any other *mesne* or final process issued against the said plaintiff.

"Wherefore the said plaintiff prays judgment against the said defendant that he, the said defendant, do return to the said plaintiff the said goods and chattels so unlawfully detained, and for the said sum of \$50, his damages so as aforesaid sustained by reason of said unlawful detention, or for said sum of \$15, the value of said property, with damages as aforesaid, in case it shall be found that a return thereof cannot be had."

To this petition the defendant below filed an answer as follows:

"Now comes the defendant above named, and for answer to the petition filed by the plaintiff, denies that he is the owner and entitled to the immediate possession of the property described in said petition, and denies that the defendant wrongfully and unlawfully detained the same for the time mentioned in the plaintiff's petition or for any other time, and denies that the plaintiff is damaged.

"Further answering the said petition, the defendant says that it is a common carrier, owning and operating a line of railroad from the city of Chicago, westwardly, through Illinois, Iowa, and through the town of Lincoln, Nebraska; that at the station of Wann, in the state of Illinois, on defendant's line of road, it received for shipment, in the regular course of business as a common carrier, one box of saddlery hardware weighing 125 pounds, consigned by the Eberhard Manufacturing Company to the plaintiff, A. J. Gustin, at Lincoln, Nebraska, the same being the goods and chattels mentioned in the plaintiff's petition, and the

said defendant carried the said freight from the said town of Wann, in the state of Illinois, to the city of Lincoln, Nebraska, for the plaintiff above named, and having thus carried the same for the plaintiff as a common carrier, the defendant had and has a lien upon and especial property in the said bill of freight thus carried for the freight charges due for the said carriage and shipment, and this defendant had such lien upon and especial property in the said freight described in plaintiff's petition at and prior to the time of the commencement of this action. The defendant therefore alleges that it had the lawful possession and lawful right to hold possession of the same until the freight charges for the said shipment were duly paid."

"The defendant denies each and every allegation contained therein, except as hereinbefore stated and admitted."

To this answer Gustin filed a reply as follows:

"Now comes plaintiff, A. J. Gustin, and for reply to answer of defendant denies each and every allegation therein contained, except as hereinafter stated and qualified, to-wit: That said defendant is a common carrier, operating a line as stated in said answer; that it received at Wann, Illinois, a box of iron castings consigned by the Eberhard Manufacturing Company to the plaintiff. Plaintiff particularly denies the allegations of said defendant that said box contained saddlery hardware, but alleges and avers that it contained iron castings. Plaintiff further admits that said box of iron castings was carried by said defendant to Lincoln, state of Nebraska."

The railway company thereupon filed a motion to strike the reply from the files, because it raised a new issue, no reply having been filed in the county court. The motion was overruled and this is the first error complained of.

Section 951 of the Code provides for the filing of a bill of particulars of the plaintiff's demand, and the defendant, when required by the plaintiff, his agent or attorney, must file a like bill of the particulars he may claim as set-

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off, and it is declared that "the evidence on the trial shall be confined to the evidence set forth in said bills." Section 952 provides for the amendment of the bills of particulars. These are all the pleadings required in an ordinary action before a justice of the peace, and as this action was properly recognizable before a justice, the same procedure would prevail in the county court as if the action had been tried in a justice court. There was no error, therefore, in overruling the motion.

Second—The plaintiff below offered in evidence the following bill of lading:

"12-14-86-150 M. Form 71.
"CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RY. CO.
"EDGAR HILL, Gen'l Freight Agent, Cleveland, O.
"A. S. WHITE, Assist. Gen'l Freight Agent, Cleveland, O.

| | |
|--|--|
| This bill of lading to be presented by consignee without alteration or erasure. | CLEVELAND, O., 9-8, 1888. |
| MARKS, CONSIGNEE, ETC. | Received from the Eberhard Manf. Co., in apparent good order, except as noted, the packages described below (contents and value unknown), marked and consigned as per —. |
| A. J. Gustin, Lincoln, Neb. | |
| This bill of lading contracts rates from — to Wann, Ill, via —, at 25c per lot, and charges advanced at \$—. | |

One box iron castings \$1 25
(Printed across the end: "C., C., C. & I. Ry. Gen'l Freight F. A., Pivi Sch. 8, 1888. E. L. Campbell, per — B. This stamps receipts for freight but not for rates. Rate, 292 pr. 100 lbs. Wann, Ill., to Lincoln, Neb. Guaranteed by Western road.")
which the C., C., C. & I. Ry. agrees to transport with as reasonable despatch as its general business will permit to destination, if on its road, or otherwise to the place on its road where the same is to be delivered to any connecting

carrier, and there deliver to the consignee or to such connecting carrier upon the following *terms and conditions*, which are hereby agreed to by the shipper, and by him accepted as just and reasonable, and which are for the benefit of everyone over whose line said goods are transported:

"1st. Neither this company, nor any other carrier receiving said property to carry on its route to destination, is bound to carry the same by any particular train, or in time for any particular market, and any carrier in forwarding said property from the point where it leaves its line is to be held as a forwarder only.

"2d. Neither this company nor any such other carrier shall be liable for any loss of or damage to said property by dangers or accident incident to railroad transportation, or by fires or floods while at depots, stations, yards, landings, warehouses, or in transit. And said property is to be carried at owner's risk of leakage, breakage, chafing, loss in weight, or loss or damage caused by changes in weather, or by heat, frost, wet or decay, and if any portion of its route to destination is by water, of all damages incident to navigation.

"3d. Responsibility of any carrier shall cease as soon as said property is ready for delivery to next carrier or to consignee, and each carrier shall be liable only for loss or damage occurring on its own line, and in case of loss or damage to such property for which any carrier shall be responsible, its value or cost at time and place of shipment shall govern settlement therefor, unless a value has been agreed upon with shipper or is determined by the classification upon which the rate is based, in which case the value so fixed by agreement or classification shall govern; and any carrier liable on account of loss of or damage to such property shall have the benefit of any insurance effected thereon by or on account of the owner or consignee thereof.

"4th. Such property shall be subject to the necessary cooperage and baling at owner's cost; and if the owner or

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consignee is to unload said property, the delivering carrier may make a reasonable charge per day for the detention of any car after the same has been held twenty-four hours for unloading, and may add such charge to the freight due and hold said property subject to a lien therefor."

* * * * *

This bill was objected to, for the reason that there was no evidence of its authenticity and because the company could not bind the C., B. & Q. Railway Company. These objections were overruled and the bill received.

It will be observed that the answer of the railroad company admits receiving at Wann, Illinois, a box of saddlery hardware weighing 125 pounds; admits in effect all that is claimed in the petition, except that they do not wrongfully withhold the same, and it alleges that the hardware is a kind classified as No. 2 in the schedule. There was no error in admitting the bill of lading, therefore. In a case of this kind, where the employment is not denied, it is probable that the bill is *prima facie* admissible in evidence, and a denial of its genuineness must be made by the adverse party to require proof on the point, but it is unnecessary to determine that point. It appears from the testimony that goods are not infrequently labeled improperly. Thus, common hardware in boxes is placed in the fourth class, while saddlery hardware is classified as No. 2; that the companies have inspectors to open the packages and place the goods in the proper class; that in this instance the inspector opened the box, which was filled with japanned iron rings, and, as Mr. Gustin had been engaged in the saddlery business, he at once seems to have assumed that the rings were designed for that business, and at once classified the goods as No. 2, the freight on which is eighteen cents per hundred. It is clearly shown that the rings are a new patent designed for a neck yoke for horses, and in no way connected with saddlery hardware. Upon this point there is practically no dispute, so that the classifi-

McDonald v. Bowman.

cation No. 4 is correct, and the rates as shown by the schedule are less than sixty-two cents per hundred, and as Mr. Gustin had offered to pay that sum, he was entitled to recover. There is no error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

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| 35 | 93 |
| 40 | 270 |

R. L. McDONALD ET AL. V. E. R. BOWMAN, SHERIFF.

[FILED JUNE 30, 1892.]

Attachment: REPLEVIN. On the 27th of January, 1890, one T. executed a chattel mortgage to M. upon his stock of "dry goods, notions," etc., and the book accounts, to secure the payment of the sum of \$1,453.47. On the 30th of the same month M. executed a mortgage to the S. Co. upon his stock of flour, etc., to secure the sum of \$85.75. On the next day two suits of attachment were brought against T., which were levied upon a part of the goods mortgaged, whereupon the mortgagees brought replevin against the sheriff and reclaimed the goods. On the trial of the cause the jury returned a verdict in favor of the sheriff for \$405.47, and found the value of the goods in possession of the mortgagees to be \$1,700, and of the book accounts \$489. It appeared also that the mortgagees were in possession, selling the goods at private sale. *Held*, That if it was conceded that the mortgagees' lien was superior to that of the attaching creditors, which we do not decide, still, there is sufficient to pay all the liens, and without a showing of prejudice to the mortgagees the judgment would not be reversed.

ERROR to the district court for Jefferson county. Tried below before BROADY, J.

Letton & Hinshaw, for plaintiff in error.

Hazlett & Le Hane, Charles O. Bates, and Hambel & Heasty, contra.

MAXWELL, CH. J.

On the 27th of January, 1891, A. W. Tester, of the village of Gladstone, being engaged in the mercantile business in the village of Gladstone, executed a chattel mortgage to R. L. McDonald "upon all my goods, notions and furnishing goods, boots and shoes and rubber goods, groceries, tobacco, and all book accounts now due said A. W. Tester, amounting to \$489," etc., to secure the payment of the sum of \$1,453.47. On the 30th of that month Tester executed a chattel mortgage to the Symes Grocer Company upon "all the stock of groceries and flour" in his store, to secure the payment of the sum of \$85.93. On the 31st of that month an action by attachment was brought against Tester by the Lycoming Rubber Company to recover the sum of \$95.39 and costs; this action was brought in the county court. On the same day an action by attachment was brought in the district court by Mannet & Heinrichs against Tester to recover the sum of \$250 and costs. These attachments were levied upon a part of the goods in question. The mortgagees thereupon brought an action of replevin, and on the trial of the cause the jury found that the defendant was entitled to the possession of the property levied upon, and that the value of such possession was the sum of \$405.72. The jury also found the value of the goods in the possession of the mortgagees was the sum of \$1,700, and the value of the book accounts assigned to M. to be the sum of \$489. Judgment was thereupon entered on the verdict. The mortgagees bring the cause into this court and a large number of errors are assigned, which, in our view, need not be considered.

This is a contest between creditors. So far as appears the mortgages were made in good faith to secure valid

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claims. The attachments also seem to have been issued and levied in good faith, and the claims upon which they were predicated, valid debts against Tester. So far as appears the plaintiffs still have enough property in their hands to satisfy their claims and costs. This being so, if all that is claimed by them as to the priority of liens is true, which we do not decide, still they are not injured. It is the duty of the court to apply the property as far as possible to payment of the liens against the debtor, and to require such payment to be made without unnecessary delay. Error does not affirmatively appear in the record and the judgment is

AFFIRMED.

THE other judges concur.

**DAVID F. ANDERSON, ADMR., V. CHICAGO, B. & Q.
R. Co.**

[FILED JUNE 30, 1892.]

1. **Negligence Causing Death: CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF.** Where, in an action for damages against a railroad company for wrongfully causing the death of plaintiff's intestate, the plaintiff proves his case without disclosing any negligence on the part of his intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant.
2. ———: ———: **ERROR WITHOUT PREJUDICE.** A verdict against the defendant in such an action will not be reversed on application of plaintiff, because of the giving of an erroneous instruction to the jury on the question of contributory negligence, its giving being error without prejudice.
3. ———: **MEASURE OF DAMAGES.** In case of a verdict in favor of the plaintiff, he is entitled to recover such a sum as the jury may deem from the evidence a fair and just compensation to the next of kin, for the pecuniary loss sustained by them, resulting

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| 35 | 95 |
| 41 | 695 |
| 35 | 95 |
| 45 | 442 |
| 35 | 95 |
| 46 | 8 |
| 35 | 95 |
| 48 | 68 |
| 35 | 95 |
| 53 | 676 |
| 35 | 95 |
| 58 | 5 |

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from the death which is made the basis of the suit, not exceeding the statutory amount.

4. ———. *Held*, The evidence sustained a verdict for nominal damages.

ERROR to the district court for Nuckolls county. Tried below before MORRIS, J.

G. M. Lambertson, for plaintiff in error:

The court erred in giving the first instruction (*Lincoln v. Walker*, 18 Neb., 244; *Hough v. R. Co.*, 100 U. S., 213), and in giving the third instruction. As to the fourth instruction: *Johnson v. R. Co.*, 18 Neb., 699; 3 Sutherland, Damages, 182; *Chicago v. Scholten*, 75 Ill., 468; *McIntyre v. R. Co.*, 37 N. Y., 287; *R. Co. v. Kirk*, 90 Pa. St., 15; *R. Co. v. Barron*, 5 Wall. [U. S.], 90; *Grotenkemper v. Harris*, 25 O. St., 510; *Penn. R. Co. v. McCloskey*, 110 Pa. St., 436. The damages are inadequate. The petition states a cause of action. (*Baltimore R. Co. v. Rowan*, 3 N. E. Rep. [Ind.], 627; *Hough v. R. Co.*, 100 U. S., 224; *Kane v. R. Co.*, 128 Id., 94; *Dist. of Col. v. McElligott*, 117 Id., 621; *N. P. R. Co. v. Hurbert*, 116 Id., 642; *Hosie v. R. Co.*, 75 Ia., 683; *Connors v. R. Co.*, 74 Id., 383; *R. & D. R. Co. v. Norment*, 84 Va., 167; *Fredenburg v. R. Co.*, 114 N. Y., 582; *Plank v. R. Co.*, 60 Id., 607; *Busby v. R. Co.*, 107 Id., 374; *Johnson v. R. Co.*, 18 Neb., 699.)

T. M. Marquett & J. W. Deweese, contra, cited, as to the first instruction: *C., C., C. & I. R. Co. v. Elliott*, 28 O. St., 352; *City of Lincoln v. Walker*, 18 Neb., 248; *R. Co. v. Coates*, 15 Am. & Eng. R. Cas. [Ia.], 265; *Parish v. State*, 14 Neb., 67; *S. C. & P. R. Co. v. Finlayson*, 16 Id., 578; *Gray v. Farmer*, 19 Id., 71; *Bartling v. Behrends*, 20 Id., 215; *Campbell v. Holland*, 22 Id., 607. As to the third instruction: *Dist. of Col. v. McElligott*, 117 U. S., 621; *Hough v. R. Co.*, 100 Id., 234; *Gibson v. R. Co.*, 63 N.

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Y., 449. The measure of damages is not the value of a life but the pecuniary loss of the next of kin. (*Grötenkemper v. Harris*, 25 O. St., 510; *Johnson v. R. Co.*, 18 Neb., 700; *N. Chicago Rolling Mills v. Morrissey*, 18 Am. & Eng. R. Cas., 47; *C., B. & Q. R. Co. v. Sykes*, 96 Ill., 173; *R. Co. v. Coates*, 15 Am. & Eng. R. Cas., 265; *Steel v. Kurtz*, 28 O. St., 199; *Van Brunt v. R. Co.*, 44 N. W. Rep. [Mich.], 323; *Clifton v. Lanning*, 61 Mich., 359.) The amount of damages to be recovered is peculiarly within the judgment and discretion of the jury. (*Johnson v. R. Co.*, 18 Neb., 699.) The contributory negligence of deceased, as shown by the testimony in this case, prevents a recovery. (*Brice v. R. Co.*, 38 Am. & Eng. R. Cases [Ky.], 38; *N. Cent. R. Co. v. Husson*, 12 Id. [Pa.], 241; *Hathaway v. R. Co.*, Id. [Mich.], 249; *A., T. & S. F. Co. v. Plunkett*, 2 Id. [Kan.], 139; *Day v. R. Co.*, 2 Id. [Mich.], 126.)

NORVAL, J.

This action was brought by David F. Anderson, as administrator of John Mossholder, deceased, against the Chicago, Burlington & Quincy Railroad Company for damages for negligently causing the death of plaintiff's intestate. Verdict and judgment for the plaintiff for the sum of \$1, to reverse which plaintiff brings the cause here on error.

It appears that the intestate was, on November 7, 1887, in the employment of the defendant as brakeman on a freight train on the line of road from Wymore to Superior. At Wymore the train was made up, and contained, among others, a flat car loaded with long bridge timbers, some of which on one side projected over the end of the car a sufficient distance to strike against the end of the box car next to it. When the train reached Strang some of the cars were uncoupled and set out and others were taken in. Mossholder, while attempting to couple the flat car before mentioned to a box car was caught between the projecting

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timbers and the box car and killed. Plaintiff insists that the car was loaded in such a manner as to endanger the lives of the employes, and that the defendant was negligent in placing it in the train and requiring the deceased to make the coupling. Defendant admits the accident and death of the intestate, but denies that its employes were negligent, and alleges that Mossholder was guilty of contributory negligence.

Complaint is made of the giving of certain instructions, and that the damages assessed by the jury are inadequate. The first and third instructions given at the request of the defendant are as follows:

"1. In this case the plaintiff, as administrator of the estate of John Mossholder, deceased, seeks to recover damages from the defendant on account of the death of said Mossholder, claiming that said death was caused by the negligence of the defendant, and that said Mossholder was free from negligence. The fact that said Mossholder was killed while coupling cars is admitted, but the defendant denies that his death was caused by the negligence of the defendant, and alleges that it was the result of the carelessness and negligence of the deceased himself. The burden of proof is upon the plaintiff to establish these two propositions of fact:

"First—That the deceased came to his death on account of the negligence of the said railroad company.

"Second—That the deceased himself was not guilty of carelessness or negligence, which caused or contributed to the accident and death. The jury are therefore instructed that unless you are satisfied, by a preponderance of the testimony, of the truth of both these propositions, then the plaintiff will not be entitled to recover, and your verdict should be for the defendant.

"3. The claim is made in this case that the cars were improperly loaded, or that they were received by the defendant, and hauled over its road after they were improv-

erly loaded with timbers. If you believe this to be true, then you will determine from the evidence:

“First—Whether the manner of loading complained of was the usual and customary way of loading and hauling such cars and timbers.

“Second—Whether the deceased knew of this manner of loading and hauling, or by proper care and attention to his business might have known of it.

“The court instructs you that if the loading of this car, or the receiving and hauling of it, by the defendant was the usual and customary manner of doing the business, and the deceased knew or might by proper care and attention have known of it, then the plaintiff cannot recover for negligence and neglect of company in hauling a car thus loaded, if you shall find same was negligence.”

It is claimed that the first of these instructions misstated the rule as to the burden of proof upon the question of contributory negligence. That instead of the plaintiff being obliged to prove that the deceased was free from fault, the burden rested upon the defendant to establish that the intestate was guilty of contributory negligence. The same point was considered by this court in the case of *City of Lincoln v. Walker*, 18 Neb., 244, where, after a consideration of the conflicting authorities, it was ruled that when the plaintiff makes out his case without showing negligence on his part, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. The instruction under consideration conflicts with the rule laid down in the case to which reference has been made, and should not have been given.

As to the third instruction, for the purposes of this case, it may be conceded that it was erroneous. But that is not sufficient ground for a new trial. Plaintiff was in no manner prejudiced on the trial of the cause by the giving of either of these instructions, for the reason that the jury found in his favor upon every issue. They found that the

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accident was the result of the negligence of the defendant and that the deceased was not at the time guilty of carelessness or negligence that contributed to his death. This would have been their finding, had the charge of the court on that subject been never so favorable to the plaintiff.

Objection is made to the fourth paragraph of the charge relating to the measure of damages, which reads as follow:

“The court instructs the jury as to the measure of damages, that if you find for the plaintiff the law allows no punitive damages, but only compensatory damages, that is, compensation to the next of kin for the pecuniary loss sustained by the death of their relative. These perhaps are in their nature uncertain and indefinite, for if the deceased had lived they might not have been benefited, and if not, then no pecuniary injury would have resulted to them from his death. It is difficult to get at the pecuniary loss with precision and accuracy, but, taking all the facts and circumstances of the case into consideration, you are, according to your deliberate judgment, to determine whether the parties for whose benefit this action was brought have suffered any pecuniary injury, and if so, you are to assess such damages as you shall deem fair and just, remembering that it is only the pecuniary value of the life of the deceased to his next of kin, that is, the pecuniary value they would have derived had his life not been terminated, that constitutes their claim for damages on account of his death.”

It is claimed that the vice in this charge consists in the court limiting the plaintiff's recovery to the pecuniary loss sustained by the next of kin, resulting from the death of intestate. Counsel for plaintiff insists that the measure of damages is the value of the life of the deceased. In considering the question it is important to keep in mind the provision of the statute of this state relating to actions for damages for the death of the person caused by the wrongful act or neglect of another.

Section 2, chapter 21, Compiled Statutes, provides:

"That every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars," etc.

Under these provisions, in actions like this, the plaintiff is entitled to recover such an amount of damages as the jury may deem from the evidence a fair and just compensation to the next of kin, having reference only to the pecuniary loss resulting from the death which is made the foundation of the suit. The damages are not to be estimated by the value of the life lost, but such a sum as the proof shows will compensate the next of kin for the pecuniary injury which they have sustained by such death. This is the rule adopted by the courts of other states under statutes similar to our own. (*Grotenkemper et al. v. Harris*, 25 O. St., 500; *Steel v. Kurtz*, 28 Id., 199; *C., B. & Q. R. Co. v. Payne*, 56 Ill., 534; *Rafferty v. Buckman*, 46 Ia., 195; *Meynning v. R. Co.*, 59 Mich., 262; *Van Brunt v. R. Co.*, 44 N. W. Rep. [Mich.], 321.)

The court, in the case at bar, correctly stated the rule of damages. The instruction was doubtless copied from the one given in *Grotenkemper v. Harris*, *supra*, which was approved by the supreme court of Ohio.

The only other error assigned relates to the amount of damages. Did the proofs justify the jury in fixing the amount they did? It is in evidence that deceased, at the time of his death, was an unmarried adult about twenty-

Anderson v. C., B. & Q. R. Co.

two years of age. Neither his father nor mother were living. There were surviving the deceased eleven brothers and sisters, all of whom but two had reached their majority and the most of whom were married. The deceased was addicted to the use of intoxicating liquors and was careless in his work. At the time of his death he was receiving the sum of \$45 per month, but prior to his engagement with the defendant he received only \$15 per month. The testimony fails to show that he saved his earnings, or that he had been in the habit of making contributions from his own means for the maintenance and support of any of his brothers and sisters, or that they were in any manner dependent upon him. True, he at one time sent \$15 to his sister Dolly while she was in Wyoming, but for what purpose does not appear. The jury would not have been justified in assessing damages not founded upon the testimony. Under the proof they were warranted in inferring that the next of kin were not pecuniarily injured by the death of the intestate, hence plaintiff was only entitled to recover nominal damages. Upon the whole record we are satisfied that no error prejudicial to the rights of the plaintiff has been committed. The judgment is therefore

AFFIRMED.

THE other judges concur.

SECOND CONGREGATIONAL CHURCH SOCIETY OF OMAHA
V. CITY OF OMAHA.

[FILED JUNE 30, 1892.]

Estoppel: CITIES: STREETS: CHANGE OF GRADE. When the authorities of a city change the grade of a street, appoint appraisers to assess the damages of abutting owners, and confirm the award when returned, the city, on the trial of an appeal taken by the land-owner from the assessment of damages, cannot urge defects and irregularities in its own proceedings in changing the grade to defeat a recovery.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

C. A. Baldwin, W. J. Connell, and W. C. Ives, for plaintiff in error, cited: *Huling v. R. Co.*, 9 Sup. Ct. Rep. [Kan.], 604; *Lewis, Em. Domain*, sec. 414.

A. J. Poppleton, contra.

NORVAL, J.

In 1887 plaintiff in error was the owner of lot 2 in Jacob's addition to the city of Omaha, also parts of lots 35 and 36 in Clark's addition to said city. All of the aforementioned lots front upon St. Mary's avenue, between Twenty-sixth and Twenty-seventh streets. In the year above stated the city council of Omaha passed an ordinance changing the grade of Twenty-seventh street from St. Mary's avenue to Leavenworth street, and that of St. Mary's avenue between Twenty-sixth and Twenty-seventh streets. Appraisers were appointed, who assessed plaintiff's damages at \$100, and from the award it took an appeal to the district court. Upon the trial the plaintiff offered in evidence the ordinance changing the grade, the appointment of appraisers, their oath and report, and the

proceedings of the city council confirming the appraisers' report, all of which were excluded by the court. Likewise all testimony offered by the plaintiff to support its claim of damages was excluded, and under the direction of the court the jury returned a verdict for the city.

It is contended by counsel for defendant in error that the proceedings taken by the city in the assessment of damages were so defective as to render the award a nullity, therefore no appeal would lie therefrom, and, as we understand it, this was the view taken by the trial court. The point is made that no legal oath was taken by the appraisers. Each made oath "that he is a resident and freeholder in the city of Omaha in said county, and is not interested in the taking and appropriation of the property and land declared by ordinance No. 82 necessary to be appropriated for the use of said city for changing the grade of Twenty-seventh street from St. Mary's avenue to Leavenworth street, and having been appointed by the mayor, with the approval of the council of said city, as one of the disinterested freeholders of said city to assess the damage to the owners of the property, respectively, to be taken by such appropriation, taking into consideration special benefits, if any, this affiant hereby accepts said appointment, and here makes oath to perform the duties of said appointment with fidelity and impartiality."

It will be observed that the appraisers were not sworn to assess the damages to property abutting on St. Mary's avenue, occasioned by the changing of the grade of that street, but to appraise the damages to owners of property appropriated to the use of the city for the changing of the grade of Twenty-seventh street from St. Mary's avenue to Leavenworth street. Clearly they were not sworn to act upon the property located on St. Mary's avenue, upon which street plaintiff's property abuts. In this respect the oath was insufficient, but the objection could not be urged in the district court on the trial of the appeal taken from

the award of the appraisers. The land-owner waives the defect by appealing, and the city, by changing the grade, and confirming the appraisers' report, waived its right to object that a valid oath was not taken. (*Trester v. M. P. Ry. Co.*, 33 Neb., 171.) Ordinarily, such an appeal is limited to the mere question of damages. Especially is this true where, as in the case at bar, no pleadings are filed presenting an issue upon matters other than the amount of damages sustained. To us it appears unjust, inequitable, and contrary to every principle of right to permit the city, after it has damaged property by changing the grade of the street upon which it abuts, to urge defects in its proceedings to defeat an appeal taken by the land-owner to recover a fair compensation for the damages sustained. To do so would be to allow the city to take advantage of its own wrong after it had accomplished that which it undertook to do, the change of the street grade. Such a rule courts should not sanction.

What has been said disposes of all objections urged by the city against the regularity of its proceedings. The court should have received the testimony tendered by the plaintiff on the question of damages. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

State, ex rel. Wilcox, v. Crabtree.

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| 57 | 489 |

STATE, EX REL. JUSTIN A. WILCOX, V. HENRY CRAB-
TREE ET AL.

[FILED JUNE 30, 1892.]

1. **Referees: FINDINGS: REVIEW.** The report of a referee upon questions of fact has the same effect as the verdict of a jury, and will not be set aside as being against the weight of evidence unless it is clearly wrong.
2. **County Seat: RELOCATION: PETITION: MANDAMUS.** A petition was presented to the board of county commissioners of Red Willow county, purporting to be signed by 1,541 resident electors of the county, requesting said board to call a special election for the relocation of the county seat, which petition contained a statement of all the matters required to be set out therein by section 1, article 3, chapter 17, Compiled Statutes. Subsequently, during the pendency of said petition, a remonstrance was filed with said board against the calling of an election, and also a petition signed by 285 of the persons who had previously signed the petition requesting that their names be stricken therefrom. After deducting all who were disqualified petitioners and those who had withdrawn their names, the petition was signed by 1,106 resident electors of said county, which exceeded in number three-fifths of all the votes cast in said county at the preceding general election. The county board denied the petition. *Held*, That the duty to call the election being enjoined by law, *mandamus* will lie to enforce the performance of the same.
3. ———: ———: ———: **COSTS.** The relator is entitled to costs against the county.

ORIGINAL application for *mandamus*.

J. S. Le Hew, and *Sidney Dodge*, for relator, cited: *Angell & Ames, Corp.*, 239, 679; *People v. Com'rs*, 4 Neb., 157; *Bouton v. Supervisors*, 84 Ill., 384; *State v. McMillan*, 8 Jones [N. Car.], 174; *Com'rs v. Batty*, 10 Neb., 176.

R. M. Snavely, for respondent, cited, contending that *mandamus* would not lie: *Howland v. Eldredge*, 43 N. Y.,

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457; *People v. Brennan*, 39 Barb. [N. Y.], 651; *Seymour v. Ely*, 37 Conn., 103; *State v. Nemaha Co.*, 10 Neb., 33; *State v. Nelson*, 21 Id., 572; *Dixon v. Judge*, 4 Mo., 286; *Dane v. Derby*, 89 Am. Dec. [Me.], 729, and note; *State v. McCrillus*, 4 Kan., 214; *State v. Supervisors*, 29 Wis., 79; *Doster v. Howe*, 28 Kan., 353; *Cushing v. Stoughton*, 60 Mass., 389; *Nelson v. Milford*, 7 Pick. [Mass.], 18; *Simmons v. Hanover*, 23 Id., 188; *Bancroft v. Linfield*, 18 Id., 556; *Boone Co. v. Armstrong*, 23 Neb., 766; *State v. Clarey*, 25 Id., 403.

Fritz Westermann, for M. E. Wheeler, intervenor, cited, contending that the county was liable for costs: *Tatlock v. Louisa Co.*, 46 Ia., 138; *Jordan v. Osceola Co.*, 59 Id., 388; *Bouton v. Supervisors*, 84 Ill., 384; *Cushing v. Stoughton*, 60 Mass., 389; *Doster v. Howe*, 28 Kan., 355; *Thomas v. Wilton*, 40 O. St., 516; *Windburn v. Litchfield*, 22 Conn., 226; *People v. Stocking*, 50 Barb. [N. Y.], 573; *Stanton Co. v. Madison Co.*, 10 Neb., 308.

NORVAL, J.

This is an original application to this court for a peremptory *mandamus* to compel the board of county commissioners of Red Willow county to call a special election for the purpose of voting on the question of the location of the county seat of said county. Upon issue being joined the cause was referred to J. B. Cessna, Esq., to take the proofs and report the same to the court, with his findings of fact. The referee, after hearing the evidence, has made and filed his report, which consists of fifty-one special findings, and returned therewith a transcript of the testimony, which contains over 2,000 closely type-written pages, including exhibits. Numerous exceptions were filed to the findings of the referee. Subsequently, but before the submission of the case to the court, the board of county commissioners filed an answer withdrawing all op-

State, ex rel. Wilcox, v. Crabtree.

position to the granting of the writ, and asking to be relieved from the payment of costs.

It appears from the petition, and the referee so found, that at the general election held in Red Willow county on the 5th day of November, 1889, there were cast 1,589 votes, and no more; that on the 25th day of April, 1890, there was filed with and presented to the board of county commissioners of said county a petition purporting to be signed by 1,541 resident electors of said county, praying said board to call a special election for the purpose of submitting to the electors of the county the question of relocating the county seat; that in addition to the names of the petitioners the petition contained, and had set opposite their respective names, the age, the section, the township, and range on which, or the city in which, the petitioner resided, and the term of his residence in the county. On the same day a like petition was filed with said board purporting to be signed by twelve other resident electors of said county. Prior to the filing of the petition last named a remonstrance was filed with the said board protesting against the calling of the election. Subsequently other petitions were filed with said board, signed by 285 of the persons who had previously signed the original petition, requesting that their names be stricken off of said petition and protesting against the calling of the election. On April 30, 1890, but after the presentation to the board of said petitions and remonstrances, another petition, of the same tenor and effect as the original, was filed with said county commissioners, purporting to be signed by twenty-seven other resident electors of the county. The original petition presented to the county board was signed by 1,106 resident electors of said county, or more than three-fifths of the qualified voters of the county, according to the returns of votes cast at the preceding general election, after deducting those who had withdrawn their names from the petition. The petition and remonstrance were pending before the county commissioners sev-

eral days, and, finally, on May 6, 1890, without hearing any testimony, a majority of the county board refused to submit to a vote of the people of the county the proposition to relocate the county seat.

The referee finds, in substance, that the county commissioners refused to hear any testimony as to the qualifications of the petitioners or the genuineness of their signatures, which finding is excepted to, as not being supported by the evidence. It is the only objection urged against the report in the brief of the respondents. Considerable testimony was taken upon this branch of the case, which was of the most conflicting character. The record discloses that the county board, at the meeting on April 30, 1890, adopted a motion to the effect that the petition for relocation *prima facie* proved itself, and that the burden of proof was upon the remonstrators. No proof being offered attacking the petition, the county board proceeded to examine the petition and remonstrance, to ascertain therefrom whether the petition was signed by a sufficient number of qualified electors to warrant the calling of an election. They made out two lists of names of the petitioners, one containing those who were personally known to the board as qualified voters, and the other the names of those who were not so known to them. Upon the first list were placed 491 names, and upon the other 865. On May 6, 1890, the board having met to further investigate the matter, passed a motion requiring the petitioners to introduce their proof on the sufficiency of their petition.

The testimony introduced by the relator tends to show that counsel for petitioners, with several witnesses, were at the time present before the board, and that said attorneys thereupon asked permission to call witnesses to establish that the petition was signed by more than three-fifths of the legal voters residing in the county, which said request was refused. The witnesses called by respondents testified that no such request was ever made. While the testimony

State, ex rel. Wilcox, v. Crabtree.

is conflicting, the evidence is ample to sustain the findings of the referee. The report of a referee upon questions of fact has the same effect as the verdict of a jury, and will not be set aside as being against the weight of evidence unless it is clearly wrong. (*Brown v. O'Brien*, 4 Neb., 195; *Cattle v. Haddax*, 14 Id., 527.)

Section 1, article 3, chapter 17, Compiled Statutes, provides: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petitions therefor being presented to the county commissioners, signed by resident electors of said county, equal in number to three-fifths of all the votes cast in said county at the last general election held therein, said petition shall contain, in addition to the names of the petitioners, the section, township, and range on which, or town or city in which, the petitioners reside, their ages and time of residence in the county, it shall be the duty of such board of commissioners to forthwith call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat," etc.

The petition first presented to the county commissioners in every essential particular complied with the requirements of the above section, and contained the requisite number of petitioners. After deducting the names of the persons who were not qualified petitioners and those who, after signing the petition, had subsequently signed a remonstrance against the same, the petition contained the names of qualified petitioners in excess of three-fifths of all the votes cast at the preceding general election. It was therefore the duty of the board under the law to have called an election and submitted the proposition to relocate the county seat to a vote of the people. The respondent having refused to perform a plain statutory duty, the relator is entitled to the relief demanded.

The only question remaining to be considered is as to costs. We think the taxable costs should go against the county. The proceedings are against the county board,

Livesey v. Brown.

and not the respondents as individuals. The county commissioners represent the county. They failed to perform a duty, not as individuals, but in their official capacity as representatives of Red Willow county. They employed counsel to appear for them, who filed an answer, and every step was hotly contested until just before the submission of the cause, when another answer was filed which, in effect, confesses the right of the relator to the writ. This change in the issues did not relieve the county from liability for the legal costs. Whether the commissioners are liable to the county therefor on their official bonds does not arise in the case and we express no opinion thereon. The amount of compensation of the referee, as well as the fees of the stenographers for taking and transcribing of the testimony, will be hereafter determined.

A peremptory writ of *mandamus* will issue to said respondent board commanding them, at their next session, to call a special election in said county and submit to the qualified electors thereof the question of relocation of the county seat of said county.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HENRY LIVESEY V. NELS O. BROWN ET AL., IM-
PLEADED WITH CRANE ELEVATOR COMPANY,
APPELLANT, AND OMAHA LUMBER COMPANY,
APPELLEE.

[FILED JUNE 30, 1892.]

1. **Mechanics' Liens: HOW SECURED.** Under the mechanic's lien law of this state the person who furnishes any material for the construction of a building by virtue of a contract, express or implied, with the owner thereof, is entitled to a lien thereon for

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Livesey v. Brown.

the amount due for the same, upon filing a sworn statement of his account with the register of deeds of the proper county within four months of the time of furnishing such material.

2. **Deeds: PAROL CONTRACT TO RECONVEY: CONSTRUCTIVE NOTICE.** Where an absolute deed, properly executed and acknowledged, is given and intended only as a mortgage, and the contract to reconvey rests in parol, the proper recording of the instrument is constructive notice of the interest of the grantee in the property therein described.
3. ———: ———: **MECHANICS' LIENS: PRIORITY.** Such lien is superior to a mechanic's lien for materials furnished under a contract entered into with the grantor after the recording of such deed.
4. **Pleading.** Every material averment in a petition, not denied by the answer, for the purposes of the action will be taken as true.

APPEAL from the district court for Douglas county.
Heard below before CLARKSON, J.

Cavanagh & Thomas, for appellant, the Crane Elevator Co., cited: *Simon v. Brown*, 3 Yeates [Pa.], 186; *Heister v. Fortner*, 2 Binn. [Pa.], 40; *M. & M. Bank v. Bank of Pa.*, 7 W. & S. [Pa.], 335; *Friedley v. Hamilton*, 17 S. & R. [Pa.], 70; Wade, Notice, secs. 187, 188; *Dey v. Dunham*, 2 Johns. Ch. [N. Y.], 188; *Weide v. Gehl*, 21 Minn., 454; *Russell's App.*, 15 Pa. St., 322; *Britton's App.*, 45 Id., 172.

Richmond & Legge, for appellee.

Kennedy, Gilbert & Anderson, for plaintiff.

Isaac Adams, for Goodman & Cooper.

James B. Meikle, for Omaha Cut Stone Company.

NORVAL, J.

This action was brought by Henry Livesey to foreclose a mechanic's lien upon lot 3 in block 317, in the city of Omaha, and the building situated thereon owned by the

defendant Nels O. Brown. The defendants Goodman & Cooper, Omaha Cut Stone Company, and Crane Elevator Company each filed a cross-petition setting up a mechanic's lien on the same property and praying a foreclosure thereof. The Portsmouth Savings Bank in its cross-petition asks the foreclosure of a mortgage, and the Omaha Lumber Company claims a lien by virtue of a deed absolute on its face, which was intended as a mortgage. Upon the trial the district court entered a decree allowing all the liens, giving the Portsmouth Savings Bank the first lien against the premises, the plaintiff Livesey and the defendants the Omaha Cut Stone Company and Goodman & Cooper second liens, the Omaha Lumber Company a third lien, and the Crane Elevator Company a lien subsequent and junior to all the others. The Crane Elevator Company appeals.

The only questions presented for our consideration are whether appellee is entitled to a lien upon the property, and if so, is such lien prior and superior to the lien or claim of the Omaha Lumber Company. The undisputed facts are these: On the 20th day of March, 1889, the defendant Brown, the owner of the lot, being indebted to the Omaha Lumber Company in the sum of \$18,000, executed and delivered to one R. W. Clayton, the secretary and treasurer of the Omaha Lumber Company, for its use and benefit a warranty deed on said lot to secure the payment of said indebtedness, which deed was duly recorded on the 9th day of December, 1889. The deed, though absolute on its face, was intended as a mortgage. In the month of February, 1880, the Crane Elevator Company entered into a contract with Brown for the placing of an elevator in the building on said lot. Work was commenced in March, but was not completed until July 21, 1890. The lien was filed September 29, 1890.

It is argued by counsel for appellee that as appellant failed to file its lien within sixty days from the completion

of the work it was not entitled to a lien. If Brown is to be regarded as a contractor merely, and not the owner of the premises, the argument would be unanswerable, for the statute requires a subcontractor to file with the register of deeds of the proper county a sworn statement of his claim for lien within sixty days from the performing of the labor or the furnishing of materials, machinery, or fixtures, in order to secure a lien therefor. Notwithstanding Brown had, prior to the making of the contract with appellant, executed an absolute deed to the property, yet, as it was not intended as an absolute transfer of the property therein described, but was given merely to secure a debt and was intended only as a mortgage, he was in equity the owner of the lot and could lawfully contract in his own name for the making of the improvement. It is a principle of law too well settled to justify a reference to the authorities, that a deed of real estate, absolute in form, executed, and intended as security for the payment of a sum of money is, in effect, only a mortgage and will be so considered as between the parties and all others having knowledge of the purpose for which it was given. Brown did not occupy the position of contractor with the holder of the equitable mortgage, but contracted with appellant in his own right as owner of the property, as he had a perfect right to do, and under the mechanic's lien law the Crane Elevator Company had four months from the completion of the work in which to file its claim for lien. It was filed in due time.

It is conceded, and such is undoubtedly the rule, that the lien of a mortgage is superior to a mechanic's lien for labor performed or materials furnished under a contract entered into after the recording of the mortgage, or where the laborer or material-man has actual notice of the existence of an unrecorded mortgage. In this case there is no proof showing that the Crane Elevator Company had actual notice that the deed executed by Brown was intended as a mortgage, or that the deed was in existence. It is

urged for appellant that the recording of the deed was insufficient to give constructive notice that it was intended as a mortgage, but that it was only notice of what it purported to be, an unconditional conveyance; in other words, that the recording of the deed was of no avail as against a subsequent incumbrance without actual notice of the real character of the transaction, and that the lien of appellant is prior and superior to the right of appellee. Counsel have cited in support of this position several decisions from the courts of other states, and also section 25 of chapter 73, 'Compiled Statutes, entitled "Real Estate," which declares that "Every deed conveying real estate, which by any other instrument in writing shall appear to have been intended only as security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith, and at the same time." By this section, where a deed absolute on its face is given, which is intended only to take effect as a mortgage, and the mortgagee executes and delivers to the mortgagor a written defeasance, the registry of the deed without recording the defeasance is notice to no one of the rights of the holder of such a conveyance; that, although spread upon the records, it is to be regarded the same as an unrecorded mortgage so far as creditors and subsequent purchasers are concerned. Such is clearly the meaning of the section. Its provisions have no application to a case where there is no written defeasance to an absolute deed given as security for a debt or loan, but the contract to reconvey rests entirely in parol. Where, as in this case, the defeasance is a verbal one, obviously it cannot be recorded and the above section could not control. In such case the proper recording

Livesey v. Brown.

of the absolute conveyance will fully protect the rights of the mortgagee. It being notice to the world of a greater interest than he has to the property, it certainly ought to be regarded as sufficient notice of his true interest therein. The record was notice at least that the grantee had some right or interest in the premises, and, had inquiry been made of him or the grantor, the true nature of the transaction would have been disclosed. We are aware that these views are not in harmony with the cases cited by appellant, but are believed to be supported by the weight of authority in this country. (Jones on Mortgages, sec. 548; *Kemper v. Campbell*, 44 O. St., 210; *Christie v. Hale*, 46 Ill., 117; *Marston v. Williams*, 47 N. W. Rep. [Minn.], 644; *Shaw v. Wilshire*, 65 Me., 485.)

Counsel for appellant have cited in their brief Wade on Law of Notice, which lays down the principle that instruments must be recorded in their true character to impart constructive notice; that an absolute deed, when intended as a mortgage, should be registered in the record of mortgages. This may be true, but we are not now called upon to determine the question, as it does not arise in this case. The cross-petition of the Omaha Lumber Company alleges that the deed in question was duly recorded in the office of the register of deeds of Douglas county on the 9th day of December, 1889. This averment is not denied by the answer of the Crane Elevator Company, nor is it controverted by the evidence, and it must be taken as true that the instrument was recorded in the proper record. Our conclusion is that the district court did not err in giving appellee the prior lien. The judgment is

AFFIRMED.

THE other judges concur.

D. E. JOHNSON V. WILBUR F. SWAYZE.

[FILED JUNE 30, 1892.]

1. **Errors: WAIVER.** The failure to except to the ruling of the trial court, to the admission or exclusion of testimony, is a waiver of the error.
2. **Pleading: AMENDMENT DISCRETIONARY.** The refusing of permission to amend a pleading in an action pending in the district court rests largely in the legal discretion of the court, and unless there has been abuse of such discretion which has deprived the party of a substantial right, this court will not interfere.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Brome, Andrews & Sheean, for plaintiff in error.

Balliet & Points, contra.

NORVAL, J.

The defendant in error brought suit in the district court against plaintiff in error upon a promissory note, of which the following is a copy:

“NEVADA, IOWA, June 25, 1888.

“One year after date I promise to pay to the order of Wilbur F. Swayze, at First National Bank, Nevada, Iowa, twelve hundred dollars, value received, with interest at the rate of eight per cent per annum until paid. If interest is not paid when due, the same shall bear interest at ten per cent; and if expense and costs are incurred by the holder in consequence of a failure to pay at maturity, the undersigned agrees to pay reasonable attorney’s fees if suit is brought on this note.

“Due June 25, 1889.

“\$1,200.

D. E. JOHNSON.”

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Johnson v. Swayze.

The petition alleges that said note was executed and delivered by Johnson at Nevada, in the state of Iowa; that no part thereof has been paid except the sum of \$78.22; that the laws of the state of Iowa, where said note was made and by its terms was payable, provides that attorneys' fees shall be allowed and taxed as costs on the amount found due at the rate of ten per cent on the first \$200, five per cent on the next \$300, three per cent on the next \$500, and one per cent on all in excess of \$1,000 so found due. It is further alleged that \$52.40 is a reasonable attorney's fee in the case.

The answer is a general denial.

Upon the trial the court directed the jury to return a verdict for the plaintiff below for the face of the note and interest less the amount indorsed as above stated.

Two errors are assigned:

First—In admitting the note in evidence.

Second—In not granting the defendant time to prepare and file an amended answer.

The first objection urged must be overruled. The proper foundation for the introduction of the note was laid before it was offered in evidence by the testimony of the plaintiff, who testified to the defendant's signature and that the instrument was received by plaintiff at Nevada, Iowa. It is argued that while plaintiff declared upon a note executed in Iowa, the testimony received prior to the offer of the same in evidence shows that it was made at Omaha, in this state, therefore there was a fatal variance between the petition and proof. We are unable to find in the record any testimony to support this contention. Plaintiff was the only witness examined before the note was received in evidence, and if we have correctly read his testimony, it does not contain anything tending to show that the note was executed at a place different from that mentioned on its face. The instrument given in evidence corresponds in every respect with the copy set out in the petition. Be-

sides, it having been admitted without objection, error cannot be predicated thereon:

There was no abuse of discretion in the court refusing, after the commencement of the trial, to grant the defendant time in which to prepare and file an amended answer. He did not state to the court the facts he desired to set up in the proposed answer, but simply that the note was obtained by conspiracy and fraud. This was a mere conclusion, and was insufficient. No excuse was given for not pleading the facts constituting the fraud in the original answer. He must have known of the fraud at that time, if any existed, and he had ample time to plead all defenses before the trial, as the suit had then been pending for more than a year. He chose to rely upon a general denial, and yet upon the witness stand he admitted the execution and delivery of the note. True, he says he signed it at Omaha, but in our opinion it was quite immaterial where the note was made, for upon the trial the plaintiff did not seek to enforce it according to the laws of Iowa, but withdrew and waived his claim for attorney's fees.

The errors assigned are overruled and the judgment is

AFFIRMED.

THE other judges concur.

**THE COUNTY OF LANCASTER ET AL., APPELLEES, V.
ELLEN RUSH ET AL., APPELLANTS.**

[FILED JUNE 30, 1892.]

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- 1. Tax Liens: FORECLOSURE BY COUNTY.** Under the statutes in force since February 15, 1877, a county treasurer is not compelled to seize and sell personal property of the taxpayer for real estate taxes before offering the realty.

County of Lancaster v. Rush.

2. ———: ———. The proviso clause of section 1, article IV, chapter 77, Compiled Statutes, restricting the foreclosure of tax liens by counties to cases where the amount due on the tax certificate exceeds the sum of \$200, is inimical to the provisions of section 4, article IX, of the constitution, and is void.
3. ———: ———. Power is conferred upon counties to foreclose tax liens by sections 1 and 2, article V, chapter 77, Compiled Statutes.
4. **Demurrer:** A MISJOINDER of parties plaintiff is not a cause for demurrer.
5. **Tax Liens: FORECLOSURE: IRREGULAR ASSESSMENT.** In 1869 the town of L. was incorporated, and there was included in its boundaries certain agricultural lands not platted. Subsequently it was incorporated as a city of the first class, including the same unplatted lands, and the proper city authorities assessed the lands in question and levied taxes thereon for municipal purposes. The lands were subsequently sold for taxes, and a tax certificate was issued to the purchaser. In an action to foreclose the tax lien it was *held*, that the action of the county commissioners incorporating the town was not void, though the unplatted lands were included, and that the taxes in question were valid.

APPEAL from the district court of Lancaster county.
Heard below before FIELD, J.

J. R. Webster, for appellant, cited: *Peet v. O'Brien*, 5 Neb., 362; *Johnson v. Hahn*, 4 Id., 139; *Pettit v. Black*, 8 Id., 59; *Lyman v. Anderson*, 9 Id., 378; *Miller v. Hurford*, 11 Id., 377; *Neb. City v. Gas Co.*, 9 Id., 346; *Cooley, Taxation*, 13, 359, 364; *Jones v. Robbins*, 8 Gray [Mass.], 339; *Campau v. City*, 14 Mich., 285; *Slauson v. Racine*, 13 Wis., 451; *State v. Dousman*, 28 Id., 547; *State v. Lancaster*, 17 Neb., 85; *Lathrop v. Mills*, 19 Cal., 514; *Att'y Gen'l v. Harris*, 19 Nev., 222.

R. D. Stearns, *N. Z. Snell*, *G. M. Lambertson*, *H. J. Whitmore*, *A. W. Scott*, and *Westermann*, *Low & Gould*, *contra*, cited: *Kittle v. Shervin*, 11 Neb., 67; *Wood v. Helmer*, 10 Id., 68; *Turner v. Althaus*, 6 Id., 54; *Clother v.*

Maher, 15 Id., 6; *Otoe Co. v. Brown*, 16 Id., 400; *Davey v. Dakota City*, 19 Id., 724; *Stuart v. Kalamazoo*, 30 Mich., 69; *People v. Maynard*, 15 Id., 463; *Shumway v. Bennett*, 29 Id., 452; *S. Platte Land Co. v. Buffalo Co.*, 15 Neb., 605; *Blanchard v. Bissell*, 11 O. St., 96; *People v. Carpenter*, 24 N. Y., 86; *Powers v. Co. Com'rs*, 8 O. St., 285; *Kountz v. Omaha*, 5 Dill. [U. S.], 443; *Mathis v. Boggs*, 19 Neb., 698; *Lawton v. Steel*, 7 L. R. A. [N. Y.], 134; *State v. Tuttle*, 53 Wis., 45; *Santo v. State*, 2 Ia., 165; *Robinson v. Bidwell*, 22 Cal., 379; *Muldoon v. Levi*, 25 Neb., 457.

NORVAL, J.

On the 22d day of May, 1884, lot 6, in block 3, in Lavender's addition to Lincoln, now part of lots 16 and 17, in block 3, McMurtry's addition to Lincoln, was purchased by the county commissioners for the delinquent taxes due thereon for the years 1870, 1881, and 1882, and for city taxes for the years 1872 and 1875, amounting to \$11.27, including interest and penalty, and a tax certificate was duly issued. This suit was brought by the appellees to foreclose the tax lien. The petition contains a table of the items of county and state taxes, and of city tax of each year, and alleges that the sum due is \$27.42. A motion was filed to strike out of the petition all items of tax of the year 1872 and prior years, which was overruled and defendants excepted. To the petition a demurrer was filed that:

1. The petition does not state a cause of action.
2. That the claim does not amount to \$200.
3. That parties plaintiff are improperly joined.
4. Because no part of the tax is paid by either of plaintiffs.

This demurrer being overruled, the appellants answered, pleading three defenses:

1. That the claim is less than \$200.

2. That plaintiffs are improperly joined.

3. That the city tax is invalid, because Lavender's addition was not legally within the corporate limits of the city of Lincoln at the time the city taxes were levied on said lot.

There was a demurrer to the first and second defenses, which was sustained and defendants excepted, and to the third defense the plaintiffs replied by a general denial. The cause was tried to the court, and judgment was rendered for the plaintiffs for the full amount claimed in the petition.

The defendants' motion to strike out of the petition all items of taxes levied prior to and including the year 1872 was properly denied. The basis of the motion is that the taxes for said years were levied under a statute requiring county treasurers to seize and sell personal property for real estate taxes, and the petition omits to allege an attempt and failure to make the tax by distress and sale of chattels. The provisions of sections 49 and 50 of the revenue law, approved February 15, 1869, and amended June 6, 1871, making it necessary to exhaust the personal property by distress and sale before the realty should become liable for the taxes assessed upon it, were repealed by an act of the legislature of this state, approved February 15, 1877. (Session Laws 1877, p. 43.) This act took effect prior to the sale of the real estate for taxes, May 22, 1884, and the failure of the appellees to allege an attempt to collect the tax by distress of goods is immaterial. Since the taking effect of the repealing act a county treasurer is not compelled to seize and sell the personalty of the taxpayer for real estate taxes before selling the real estate. (*Kittle v. Shervin*, 11 Neb., 65; *State v. Cain*, 18 Id., 631.)

It is urged that the petition did not allege a cause of action, because the amount claimed to be due upon the tax certificate does not amount to \$200. The precise question was before the court in *County of Lancaster v. Trimble*, 33 Neb., 121, decided at the present term, and the same

case upon rehearing, 34 Neb., 752, and it was held that the proviso clause of section 1, article 4, chapter 77, Compiled Statutes, restricting the foreclosure of tax liens by counties to cases where the amount due on the tax certificate exceeds the sum of \$200, is inimical to the provisions of section 1, article 9, of the constitution. The conclusion there reached is sound. The constitution requires that all the taxable property in the state shall contribute its proportionate share of taxes, and prohibits the legislature from releasing the property of an individual from the taxes imposed thereon. The only remedy for the enforcement of the collection of the tax levied on the real estate in question is by foreclosure proceedings, and if such action cannot be maintained because the amount due is less than \$200, then said real estate is released from said taxes, and an increased burden will necessarily fall upon other property. We adhere to the conclusion of the court announced in the second hearing of *Lancaster County v. Trimble, supra*, to the effect that in addition to the special provisions of statute providing for the foreclosure of a tax lien by a county, the power is conferred by sections 1 and 2, article 5, chapter 77, Compiled Statutes.

The third point of the appellants' demurrer to the petition was rightly overruled. A misjoinder of parties plaintiff is not a cause for demurrer. (*Davey v. Dakota Co.*, 19 Neb., 721.) The city of Lincoln had an interest in the amount due on the tax certificate to the extent of the unpaid delinquent city taxes against the lot. Under section 40 of the Civil Code all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiff." It was not necessary, however, that the city should be made a party plaintiff. The action could have been prosecuted in the name of the county to collect the entire delinquent taxes levied for state, county, school district, municipal, and other purposes. In such case the county treasurer, when the money

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is collected, is required to account and pay over to the state treasurer, school district treasurer, and city treasurer the proportion of the amount actually received due each. The city of Lincoln being a party to the suit, the court found what portion of the whole amount was due it. The appellants were not prejudiced thereby.

It is finally urged that the city tax imposed upon this lot is void, for the reason that the lot was not at the time within the limits of the city of Lincoln, and therefore was not properly taxable for municipal purposes. On the 7th day of April, 1869, the county commissioners of Lancaster county, upon a petition presented them for that purpose, incorporated the town, now city, of Lincoln, which included in its boundaries the east half of the northwest quarter of section 25, town 10 north, range 6 east. This tract in 1869 was occupied by the owner as a farm. It had not yet been platted or subdivided, nor was it used for urban purposes. Subsequently, on the 22d day of April, 1869, the owner of the land made, executed, and filed for record a plat known as Lavender's Addition to Lincoln, which included a portion of said tract. Lots were subsequently conveyed in said addition by Luke Lavender, the proprietor, with reference to that plat. The lot on which the tax which is in controversy in this suit was in the said east half of the northwest quarter of section 25.

Counsel for appellants contend that said tract was not legally taken into the corporate limits, for the reason that the commissioners had no authority to take into the boundaries of the town ground in excess of ten acres not platted or subdivided nor used for urban purposes, and for that reason the tax was unauthorized and void. The same question was passed upon by this court in *McClay v. City of Lincoln*, 32 Neb., 412; and it was held that the action of the county commissioners incorporating the town of Lincoln was not void, although lands not platted, but used for agricultural purposes, were included in the boun-

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daries of the corporation, and that where the proper authorities of Lincoln have assessed and levied taxes on such unplatted lands for municipal purposes, which were subsequently paid by the owners under protest and notice, an action could not be maintained by them to recover the taxes thus paid. The question was carefully considered in that case, and numerous precedents are cited which sustain the conclusion reached. The decision is authority for holding that the city taxes involved in this case are valid. The judgment of the district court is

AFFIRMED.

THE other judges concur.

JOHN I. REDICK, APPELLANT, V. CITY OF OMAHA,
APPELLEE.

[FILED JULY 1, 1892.]

Special Assessments: INJUNCTION. In an action to enjoin certain special assessments for the improvement of a public street, *held*, that neither the pleadings nor proof presented a case to entitle the plaintiff to relief.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

W. A. Redick, for appellant:

The mode of levying the tax (according to benefits) is the measure of the power, and if levied in any other mode it is unauthorized and void. (*Zottman's Case*, 20 Cal., 102; *Paving Co. v. Painter*, 35 Id., 699; *Murphy v. Louisville*, 9 Bush [Ky.], 189.) This assessment is void, because based on the cost of the work, and not on special benefits

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assessed and apportioned. (*Johnson v. Milwaukee*, 40 Wis., 315; *Watkins v. Zwietusch*, 47 Id., 513; *Hanscom v. Omaha*, 11 Neb., 37; *Thomas v. Gain*, 35 Mich., 156.) An assessment by foot-frontage rule has been held void, as not according to benefits. (*State v. Hudson*, 5 Dutch. [N. J.], 104; *State v. Bergen*, 1 Zab. [N. J.], 342; *State v. Jersey City*, 4 Id., 662; *State v. Passaic*, 8 Vroom [N. J.], 65; *Cronin v. Jersey City*, 9 Id., 410; *St. John v. E. St. Louis*, 50 Ill., 92.) An assessment by the foot-front rule cannot be sustained upon rural lot or land. (*Cleveland v. Tripp*, 13 R. I., 61; *Kaiser v. Weise*, 85 Pa. St., 366; *Perry v. Little Rock*, 32 Ark., 31; *State v. Dist. Court of Ramsey Co.*, 29 Minn., 62; *Masters v. Scroggs*, 3 M. & S. [Eng.], 447; *Stafford v. Hamston*, 2 B. & B. [Eng.], 691.)

A. J. Poppleton, contra:

The determination of the board of equalization as to the method of assessment is exclusively within its jurisdiction. (*Teegarden v. Racine*, 14 N. W. Rep. [Wis.], 614; *Lent v. Tilson*, 14 Pac. Rep. [Cal.], 71; *Paulson v. Portland*, 19 Pac. Rep. [Ore.], 155; *Hunt v. Rahway*, 39 N. J. L. 646; *Little Rock v. Katzenstein*, 12 S. W. Rep. [Ark.], 199.) A foot-front assessment, where the benefits are found by the board of equalization of the council to be equal and uniform, is expressly authorized by section 42 of the charter. (*O'Reilly v. Kingston*, 21 N. E. Rep. [N. Y.], 1004; *McCormick v. Harrisburg*, 18 Atl. Rep. [Pa.], 126; *Winona Co. v. Watertown*, 44 N. W. Rep. [S. Dak.], 1072; *Wilber v. Springfield*, 14 N. E. Rep. [Ill.], 871; *Davis v. Lynchburg*, 6 S. E. Rep. [Va.], 230.) Equity will not interfere to enjoin the collection of a tax unless some special reason is shown affecting the validity of the assessment or unless the tax sought to be enjoined was not authorized. (*Cooley*, Taxation, 536; *Hannewinkle v. Georgetown*, 15 Wall. [U. S.], 548; *Kellogg v. Oshkosh*, 14 Wis., 678; *Dodd v. Hartford*, 25 Conn., 232; *Arnold v. Middleton*,

39 Id., 401; *Loud v. Charlestown*, 99 Mass., 209; *Whiting v. Boston*, 106 Id., 350; *Page v. St. Louis*, 20 Mo., 136; *Marsh v. Brooklyn*, 59 N. Y., 280.) Appellant had a legal remedy under the statutes by paying his tax under protest and bringing an action to recover it back. Having failed to avail himself of this, he has no standing in a court of equity. (*Adsit v. Lieb*, 76 Ill., 198; *Peoria v. Kidder*, 26 Id., 351; *Archer v. Terre Haute*, 102 Id., 493; *Andrews v. Rumsey*, 75 Id., 598.) Appellant does not, in his petition, tender or deposit the amount of the assessment admitted to be due, therefore he has no standing in a court of equity. (*Barker v. Omaha*, 16 Neb., 271; *Hallenbeck v. Hahn*, 2 Id., 426; *Wood v. Helmer*, 10 Id., 75; *Hunt v. Easterday*, 10 Id., 165; *Boeck v. Merriam*, Id., 201.)

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant to enjoin the collection of certain special taxes assessed against the property of the plaintiff described in the petition, on the ground that said assessment was unconstitutional and void. Issues were joined and on the trial of the cause the court made special findings as follows:

“The evidence is quite meager, but it sufficiently appears therefrom, and from the pleadings, that the tax in question was levied according to foot-frontage, upon property along a portion of Farnam street, to pay for one-half of the expense of certain grading in front of plaintiff’s property. The tax was at the rate of about \$1.68½ per front foot upon a strip 132 feet deep of the tract in question, which had not been divided into lots and blocks. The tract was a little less than 600 feet square; the frontage being about 586 feet, and the taxes being \$9,561.82.

“Second—There was no attempt to show by proofs that as a fact this exceeded the special benefits conferred upon plaintiff’s property by the grading, or was more in proportion to such benefits than the tax upon other property

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similarly benefited. The case rests upon the theory that a tax by foot-frontage is unconstitutional, illegal, and arbitrary, and therefore void. In this case the board of equalization and council determined that the rule was just, and there is no evidence to the contrary. The record does not show that the plaintiff made any complaint, at the time, against the apportionment of the expenses; or that his property was charged with more than its just share. (See 10 Neb., 216; 11 Id., 75; Id., 347.)

“Facts of which the court may take judicial notice regarding the boundaries, situation, and progress of the city, at and subsequent to the time in question, refute the theory of the petition, that the premises were mere agricultural lands, unsusceptible of benefits from municipal improvements. It is within the common knowledge that these extend far beyond its boundaries, in all directions, into populous wards, and districts of elegant and costly residences, and high priced city property. The plaintiff makes no offer to pay any portion of the tax, or grading expense, but stands upon the proposition that the tax was a nullity. If that were so, the court, under the circumstances, might properly leave him to his legal remedies for resisting it, or defending against any title or lien set upon it. (See 16 Neb., 269, and numerous cases holding that he who seeks equity must do equity.) The action must be dismissed for want of equity at plaintiff’s cost.”

The court thereupon dismissed the action for want of equity.

The pleadings and evidence tend to show that the assessment was substantially correct, and fail to show any ground for equitable relief on behalf of the plaintiff. He waited until the improvement was made, without raising any objections to the improvement itself or the mode of assessment, and the proof fails to show that the rule adopted is inequitable. The plaintiff fails also to offer to pay the amount justly due for such improvement, and therefore does

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not commend himself to a court of equity. There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

WILLIAM M. POWERS V. JACOB E. HOUSE.

[FILED JULY 1, 1892.]

Review. *Held*, That there is no material error in the record.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

A. C. Wakeley, for plaintiff in error.

A. N. Ferguson, and *Winfield S. Strawn*, *contra*.

MAXWELL, CH. J.

The plaintiff in the suit below was Jacob E. House. The defendants were George R. Scougal, Martin P. Ohlman, William M. Powers, Miles T. Wooley, and F. M. Ziebach, of whom Powers only was served. The plaintiff House is a civil engineer, and resides in the city of Omaha. The defendants constituted a committee appointed at a meeting of the citizens of Yankton, Dakota, and resided in Yankton. This committee was appointed for the purpose of supervising and taking charge of a survey of a proposed line of railroad from Yankton to Sioux Falls, in the then territory of Dakota.

The petition alleges, in substance, the employment of the plaintiff by this committee at a salary of \$200 per month and expenses; that the plaintiff commenced work about

September 23, 1887, and continued in it until the middle of November, 1887; that thereby there became due him \$400 for his services; that his fares and expenses incurred in the prosecution of the work amounted to \$91.85; that he was paid upon account \$200, and that there is due him \$291.85 with interest.

The answer upon behalf of Mr. Powers, the only defendant upon whom service was had, sets up the following defenses:

"First—That the plaintiff House was hired by the committee, to be paid at the rate of \$200 per month, the plaintiff agreeing to find and run a good practicable line for the proposed road, and also, in consideration of being allowed to be absent from the field of operations when not needed, he would at all other times be present for the carrying on of the work, and would devote such time, attention, and skill to the making of the survey as might be necessary and requisite; that the plaintiff entered upon the prosecution of his work September 26, 1887, and upon November 2, 1887, was notified by the committee that his services were no longer needed."

The answer then sets up the law of Dakota relating to the limited obligation of a party acting as agent.

As a further defense and as a counter-claim it is alleged in answer that the plaintiff House was frequently, for days together, absent from the field of operations on the survey when his assistance and skill were needed for the proper carrying on of the work; that the plaintiff so negligently and carelessly did his work that it was of no value whatever; that the line projected by the plaintiff was never used, and that the amount expended in the survey, to-wit, over \$800, was lost to the defendants, and that the entire work had to be done over at great expense to the defendants.

In reply the plaintiff denies that he was hired in the city of Yankton, but insists that the contract was made in the city of Omaha by one J. H. Teller, representing the com-

mittee. The plaintiff also denies the allegations of the answer, setting up the Dakota statute as to the liability of agents. The plaintiff also denies that he negligently or unskillfully performed the work, or that the defendants have suffered damages to the extent of \$800, or any other sum. The plaintiff then sets up that the line that he was hired to run was only a preliminary line, and if not used by the defendants it was not his fault.

On the trial of the cause the jury returned a verdict in favor of House for the sum of \$327, upon which judgment was rendered.

The testimony tends to show the following in regard to the contract between House and the defendants. The citizens of Yankton had for some time been desirous of building a railroad from the city of Yankton, Dakota, to the city of Sioux Falls, Dakota, a distance of about seventy miles. With this end in view, a public meeting of the citizens of Yankton was held, money was raised by subscription, and a committee comprising five of the representative citizens of that place was appointed. The duty of this committee was to provide for a survey of the proposed railroad and to disburse the funds collected at the meeting for carrying on the project. The country which it was proposed the new railroad should traverse between the points spoken of was, in part, rough and hilly, and presented in places points of difficulty as to grade, and in general was of such a nature as to require the skill and experience of an expert civil engineer; that one of the principal inducements to the making of the proposed road lay in the fact that it was to be adopted and used by the St. Paul, Minneapolis & Manitoba Railroad Company. To meet the requirements of the latter road it was necessary that the new road should have no grades exceeding thirty feet to the mile. For these reasons the services of an engineer skilled in the location of a railroad were absolutely necessary. At the request of the committee and in fact constituting a member of

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it, Mr. J. H. Teller, mayor of the city, was deputed to go to Omaha, ascertain whether he could procure an engineer competent for the work proposed, acquaint him with the salient points to be obtained, ascertain the terms upon which the work could be done, and report the result of his investigations to the committee at Yankton. In the performance of this, Mr. Teller came to Omaha and consulted two engineers, one of whom was Mr. House. He acquainted House with the object of his visit, told him that the committee having the matter in charge had sent him to procure a locating engineer, that the road would be adopted by the Manitoba Railroad Company, and that its grades must not exceed thirty feet to the mile. The terms of payment were discussed. The terms proposed by House were \$200 a month for such portion of his time as he might actually be needed in the field. House explained to Teller that upon the level prairie no locating engineer would be needed, and that he thought it would be practicable to run the survey in the manner indicated; that is, House only to be in the field a portion of the time, and to be allowed to return to Omaha when not actually needed on the line. House explained that were he to give his entire time to the work he would charge \$25 per day, but if he gave only divided time to the work he would undertake it for \$200 per month. Mr. Teller inquired of Mr. House, what experience in general he had had in the location of railroads. Mr. Teller informed Mr. House that he was not authorized to close the contract but would return to Yankton, report their conversation to the committee, and if he was wanted upon the terms indicated, to-wit, \$200 per month and divided time, he would notify him. Mr. Teller returned to Yankton and submitted to the committee the proposition made by House, the committee accepted it, and Mr. Teller was directed to so notify Mr. House, which he did. The letter is set out in the record and need not be further noticed. It is unnecessary to review the testimony at length.

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The defendant in error did not guarantee a line whose grade should not exceed thirty feet to the mile, and there is no proof that such a line could be obtained. He seems to have done all that was required of him as far as he was able. Even if we should hold that the contract was made in Dakota, still it would not alter the rights of the parties, as there seems to be no proof that the plaintiff in error acted as agent for any one in this transaction. Upon the whole case there is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

MARTIN ITTNER V. WILLIAM T. ROBINSON ET AL.

[FILED JULY 1, 1892.]

1. **Appeal: IDENTITY OF ISSUES.** Where a cause has been appealed to the district court and an amended petition filed which contains the same cause of action set forth in the court below, but the facts are set out more in detail, a motion to strike the new matter from the petition *held* to be properly overruled.
2. **Lease: CONTRACT BY LESSEE TO PAY TAXES DOES NOT INCLUDE SPECIAL ASSESSMENTS.** While in a general sense the word "taxes" includes special assessments, and special assessments are made under the taxing power, yet there is a clear distinction between the two; special assessments are a peculiar class of taxes which are laid upon property benefited according to some equitable rule, while taxes, as generally understood, mean the burdens imposed by the government for state, county, city, township or school district purposes; in other words, the money necessary to defray the expenses of government. A promise by a lessee of real estate to pay all taxes upon the property does not apply to special assessments for the construction of a sewer.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

Winfield S. Strawn, for plaintiff in error, cited: *Cassady v. Hammer*, 62 Ia., 359; *In re Mayor*, 11 Johns. [N. Y.], 77; *Blake v. Baker*, 115 Mass., 188; *Love v. Howard*, 6 R. I., 116; *Municipality v. Curell*, 7 La., 203; *Beals v. Rubber Co.*, 11 R. I., 381.

Switzler & McIntosh, contra, cited: *Second Universalist Soc. v. Providence*, 6 R. I., 235; *In re College St.*, 8 Id., 474; *In re Dorrance St.*, 4 Id., 230; *Jeffrey v. Neal*, 6 L. R., C. P. [Eng.], 240; *Tidswell v. Whitworth*, 2 Id., 326; *Barrett v. Duke of Bedford*, 8 Term Rep. [Eng.], 602; *W. & St. P. R. Co. v. Watertown*, 44 N. W. Rep. [S. Dak.], 1072; *R. Co. v. Lynchburg*, 81 Va., 473; *Norfolk v. Ellis*, 26 Gratt. [Va.], 224; *King v. Portland*, 2 Ore., 156; *Manning v. Klippel*, 9 Id., 373; *Inhabitants v. Morton*, 25 Mo., 593; *Weeks v. Milwaukee*, 10 Wis., 242; *Hill v. Higdon*, 5 O. St., 243; *Twycross v. R. Co.*, 10 Gray [Mass.], 293; *Blake v. Baker*, 115 Mass., 188.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant to oust the defendant from the possession of certain real estate. A demurrer to the petition was sustained and the action dismissed. The petition is as follows:

"Now comes Martin Ittner, guardian of the minor heirs of Benjamin Ittner, deceased, and states that he is such guardian and duly qualified as such, and that he was formerly the administrator of Benjamin Ittner, deceased, and for complaint against the defendants William T. Robinson and ——— Hardin, real name unknown, and Hardin & Robinson states that * * * the minor heirs of Benjamin Ittner, deceased, * * * are as follows: Horace H. Ittner, Ernest A. Ittner, and Henrietta Maud Ittner.

"Plaintiff states that said minors are seized in fee-simple of an interest in nine acres of land, more or less, in the northwest quarter of the southwest quarter of section

10, in township 15 north, of range 13 east, with the appurtenances thereunto belonging, and numbered as lot 55 for taxable purposes, but not including the brick house and about two acres of land occupied by Mrs. Ittner, wife of deceased, in 1881, all in Douglas county, state of Nebraska, and avers that they are entitled to the possession thereof. Plaintiff says that on or about the 23d day of March, 1881, plaintiff, who was their said administrator, leased said premises to one Edward Reed for the term of twelve years, which lease has since been assigned by said Edward Reed to the defendants, who entered into the possession thereof, and are now in possession. Plaintiff says that in said lease are found the following conditions, which plaintiff claims are binding upon defendants, as follows, viz.: 'And the said Edward Reed, in consideration of the leasing aforesaid, doth agree to pay as rent for said premises the sum of \$150 per annum, payable semi-annually in advance, for the period as aforesaid, together with all taxes that may be assessed against said premises during the continuance thereof.' It was further provided in said lease that it is agreed that the estate shall not be liable for the costs of any improvements or repairs put upon the place, or for any damage for opening streets through the premises by the city or otherwise. It was further provided in said lease that it is expressly agreed and understood by and between the parties hereto that in case the rent above reserved, or any part thereof, be not paid at the time the same becomes due and payable, or if any other condition or agreement herein contained on the part or behalf of the said Edward Reed be not by him fully complied with and performed, then and in that case the said Ittner, or his successors in authority, shall have the right, at his option, to declare this lease at an end and thereby cancel and annul the same and retake immediate possession of said premises and to put out and remove any person occupying the same. It was also provided in said lease that the cov-

enants and agreements in this lease shall succeed to and be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto. Plaintiff says said lease was recorded the same day of its execution and delivery, in the office of the county clerk of said county, and before the assignment thereof from said Reed to defendants.

"Plaintiff says that the sewer tax in district No. 79 of the city of Omaha has been assessed and levied on the said premises and became delinquent on February 3, 1889, and is still due and unpaid, and plaintiff has requested the defendants to pay the same, but they have failed and refused so to do, and now refuse so to do, being liable therefor, as plaintiff claims, under the covenants in said lease contained as above set forth. Plaintiff says that on or about August 31, 1889, he notified the defendant Robinson personally that unless that tax was paid by said defendant, that he should cancel the lease and take possession of said premises; that said defendants have refused to pay said tax, after said Harding has promised to do so, and by reason of the premises they now, and at the commencement of this suit, unlawfully and forcibly hold over their term.

"Plaintiff says that on the 31st day of August, 1889, plaintiff served upon the defendant a notice, in writing, to leave the said premises. Plaintiff says said taxes are a lien on said premises. Plaintiff asks restitution of said premises and costs of suit."

A motion was made to strike out certain parts of the petition upon the ground that this being an appeal case it must be tried substantially upon the same issues as in the court below. The matter objected to does not change the cause of action. It is simply a more detailed and definite statement of the facts on which the plaintiff bases his claim for relief. This, in certain cases, is admissible. The motion therefore was properly overruled.

Second—The principal contention of the plaintiff is, that

the provision in the lease, that the lessee or his assignee should pay "all taxes that may be assessed against said premises during the continuance" of the lease, includes special assessments.

Judge Cooley says: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it." (Cooley on Taxation, 416.)

He also says: "Some of the cases assume the narrow ground that the constitutional provisions refer solely to state taxation, or that, if they go further to the general taxation for state, county, and municipal purposes, but the view generally expressed is, that though assessments are laid under the taxing power, and are in a certain sense taxes, yet that they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our constitutions and statutes. Others are rested on both reasons. (Id., 436.)

A leading case on this question is *Matter of the Mayor, etc., of N. Y.*, 11 Johns. [N. Y.], 77. In that case, the statute of New York exempted churches or places of public worship from being taxed by any law of the state. It was held that this exemption applied only to general and public

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taxes and did not include assessments of the benefit resulting to the property from opening and enlarging public streets.

In *Bleecker v. Ballou*, 3 Wend. [N. Y.], 263, a tenant took a lease of certain real estate for twenty-one years and covenanted "to pay all taxes, charges, and impositions" which could be imposed upon the demised premises during the term. It is said "there is no doubt the assessment in question is not a tax, that being a sum imposed as is supposed for some public benefit." It was held, however, that the words "charges and impositions" included assessments, and hence that the lessee was liable for the same. The question was very ably reviewed by the supreme court of South Dakota in *Winona, etc., R. Co. v. City of Watertown*, 44 N. W. Rep. [S. D.], 1072. In that case a territorial statute exempted the property of the railway from "all taxation." It was held that the real estate of the company was not thereby exempted from an assessment for local municipal improvement, and that such an assessment was not taxation within the meaning of the grant.

It will be conceded that the power to levy special assessments is derived from the taxing power of the government, but the word "taxes" without more is not generally understood to include assessments. In the case at bar the defendants agreed to pay a certain amount of rent semi-annually, and to pay the taxes upon the property. Had the parties intended that the defendants should pay for the construction of a sewer or other improvements which would greatly enhance the value of the property, no doubt they would have so provided. In our view, the agreement to pay taxes included simply the ordinary taxes upon the property, and did not include special assessments for the construction of sewers. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

WEeping WATER ELECTRIC LIGHT CO. v. J. H.
HALDEMAN ET AL.

[FILED JULY 1, 1892.]

1. **Jurors: MOTION TO QUASH PANEL: VERIFICATION.** A motion to quash the panel of jurors, because not drawn in proportion to the number of electors of the several precincts of a county, was verified by the attorney upon mere belief. *Held*, Not sufficient to justify the court in quashing the panel.
2. ———: ———: **WAIVER.** After the jury was called into the box the attorney who had filed objections to the panel waived all objections to the jury, and also his peremptory challenges. *Held*, A waiver of objections that the jury was not properly drawn.
3. **Review.** The verdict and judgment conformed to the proof, and are affirmed.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

H. D. Travis, for plaintiff in error, cited: *Bohanan v. State*, 15 Neb., 211; *Gardner v. Turner*, 9 Johns. [N. Y.], 261; *Price v. McComas*, 21 Neb., 195; *Grimes v. Cannell*, 23 Id., 187; *Cole v. Kerr*, 19 Id., 553; *Stonebraker v. Ford*, 81 Id., 532; *Elder v. Miller*, 60 Me., 118; *Bank v. Farrer*, 46 Id., 293; *Gray v. Currier*, 62 Ia., 535; *Tootle v. Lyster*, 26 Kan., 589; *Golden v. Cockril*, 1 Id., 259; *Ellis v. Martin*, 60 Ala., 394; *Bowers v. Andrews*, 52 Miss., 596; *Winter v. Landphere*, 42 Ia., 471; *Tindall v. Wasson*, 74 Ind., 496; *Beall v. White*, 94 U. S., 382; *Steavens v. Pence*, 56 Ia., 257; *Argues v. Wasson*, 51 Cal., 620; *Ludwig v. Kipp*, 20 Hun [N. Y.], 265; *Reed v. Carpenter*, 20 O., 88; *La. State Bank v. Senecal*, 13 La., 525; *Natl. Bank v. Norton*, 1 Hill [N. Y.], 572; *Washington Bank v. Lewis*, 22 Pick. [Mass.], 24; *Black v. Winterstein*, 6 Neb., 225.

J. H. Haldeman, contra, cited: *Clark v. Saline Co.*, 9 Neb., 522; *Jones, Chat. Mort.*, sec. 65; *Peters v. Parsons*, 18 Neb., 191; *Jordan v. Bank*, 11 Id., 503.

MAXWELL, CH. J.

This is an action in replevin brought by the plaintiff against the defendants to recover the possession of "one dynamo, one exciter, one engine, two reostats, one volt meter, one ampere meter, one lightning arrester, six switches, one ground director, together with all wires, sockets, lamps, poles, cross-arms, insulators, cleats, copper brushes, and belts, and all attachments and regulating instruments whatsoever belonging to the Weeping Water Electric Light Plant." The property was taken possession of by the plaintiffs under the order of replevin, and on the trial of the cause the jury returned a verdict in favor of the Westinghouse Electric Company as follows: "We, the jury, duly impaneled and sworn in the above entitled cause, do find that at the commencement of this action the Westinghouse Electric Company, defendant, was entitled to the possession of the property in question, and we find the value of such possession to be the sum of \$2,897.26; we further find and assess the said defendant's damages for the detention of said property in the sum of \$——." A motion for a new trial having been overruled, judgment was entered in favor of the Westinghouse Electric Company for the possession of the property, or in case such property could not be returned, the value thereof, to-wit, the sum of \$2,897.26 and costs, and the case as to Haldeman was dismissed.

The first error relied upon by the plaintiff is the overruling of the motion to quash the panel of petit jurors. The motion is as follows:

"Comes now the plaintiff, by its attorney, and objects to the panel of petit jurors drawn for the March term, 1891,

Weeping Water Elec. Light Co. v. Haldeman.

of the district court of Cass county, for the following reasons, to-wit :

“First—The panel was selected on the basis of the total vote of Cass county cast at the general election in 1889, which was 4,376, whereas the panel should have been selected on the basis of the general election of 1890, held in November of said year, the total of which vote was 5,145. The following table shows the jurors as drawn and as they should have been drawn, which shows that the jurors are not distributed among the several precincts as nearly as may be, as required by section 658 of Civil Procedure :

| | |
|-------------------|-------|
| Vote of 1890..... | 4,376 |
| Vote of 1891..... | 5,145 |

| PRECINCT. | Vote of 1890. | Jurors March Term, 1891. | Correct No. Jurors. | Errors. |
|---------------------------|---------------|--------------------------|---------------------|---------|
| Tipton | 245 | 3 | 3 | ..... |
| Greenwood | 195 | 3 | 2 | 1 |
| Salt Creek | 237 | 3 | 3 | ..... |
| Stove Creek..... | 286 | 3 | 3 | ..... |
| Elmwood | 221 | 2 | 3 | 1 |
| South Bend..... | 167 | 2 | 2 | ..... |
| Weeping Water Pr..... | 161 | 2 | 2 | ..... |
| Center | 189 | 3 | 2 | 1 |
| Louisville | 223 | 3 | 3 | ..... |
| Avoca | 227 | 2 | 3 | 1 |
| Mt. Pleasant..... | 167 | 2 | 2 | ..... |
| Eight Mile Grove | 242 | 3 | 3 | ..... |
| Liberty | 375 | 4 | 4 | ..... |
| Rock Bluffs..... | 318 | 3 | 4 | 1 |
| Plattsmouth Pr..... | 285 | 3 | 3 | ..... |
| W. W. City, 1st Wd..... | 116 | 1 | 1 | ..... |
| W. W. City, 2d Wd..... | 126 | 1 | 1 | ..... |
| W. W. City, 3d Wd..... | 74 | 1 | 1 | ..... |
| Platts. City, 1st Wd..... | 242 | 3 | 3 | ..... |
| Platts. City, 2d Wd..... | 304 | 4 less 1 | 4 less 1 | ..... |
| Platts. City, 3d Wd..... | 316 | 4 | 4 | |
| Platts. City, 4th Wd..... | 290 | 4 | 3 | 1 |
| Platts. City, 5th Wd..... | 139 | 1 | 2 | 1 |
| | 5,145 | 61 | 67 | |

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"Second—One Maurice O'Rourke was called to fill a vacancy in regular panel caused by absence of regular juror; he having been a member of the regular panel within two years prior to this time and not eligible as a juror; and further, that the sheriff failed to summon C. O. Cole, of Plattsmouth precinct, through a mistake of the name, the name being S. O. Cole instead of C. O. Cole; that Plattsmouth precinct is not represented by the number of jurors to which it is entitled. The aforesaid panel does not constitute a legal jury within the meaning of the statute for the reasons aforesaid, and the plaintiff objects to going to trial at this time and moves to quash the panel.

"H. D. TRAVIS,
"Att'y Pl'ff.

"STATE OF NEBRASKA, } ss.
CASS COUNTY. }

"H. D. Travis, being first duly sworn, deposes and says that he is attorney for plaintiff in above entitled cause, and that the facts stated in the foregoing instrument are true, as he verily believes. H. D. TRAVIS."

"Subscribed in my presence and sworn to before me this 6th day of March, A. D. 1891.

"[SEAL.]

J. M. LYDA,
"Notary Public."

It will be observed that this motion is verified upon belief of the attorney. The Code permits ordinary pleadings to be verified upon information and belief. The object is to appeal to the conscience of the pleader and thereby obtain a truthful statement of the facts. When, however, the pleading is to be used as an affidavit as well as a pleading it must be verified positively. The evidence is not sufficient therefore to warrant the court in setting aside the panel of jurors.

Second—The evidence shows that the attorney of the plaintiff in error afterwards waived all objections for cause to the jurors called to try the case and also his peremptory

challenges. This, in our view, is a waiver of challenge to the array, even if it had been properly made.

Third—The testimony shows that on the 3d day of December, 1889, J. P. Smith and J. H. Bellows executed a chattel mortgage upon the property in question for part of the purchase price of said property to the Westinghouse Electric Light Company; that no part of said debt was paid; that about that time the plaintiff company organized and claims to have purchased the property in question. It is sufficient to say that if it did so purchase it, it did so with knowledge of the Westinghouse claim and mortgage, and is in no sense an innocent purchaser. The judgment is the only one that should be rendered upon the evidence and is

.AFFIRMED.

THE other judges concur.

NEBRASKA RY. CO., APPELLANT, V. HELEN CULVER
ET AL., APPELLEES.

[FILED JULY 1, 1892.]

1. **Statute of Limitations.** *Held*, That the statute of limitations had not run in favor of the plaintiff.
2. **Res Adjudicata.** That the question involved had already been determined in the case of *Hull v. C., B. & Q. R. Co.*, 21 Neb., 371; S. C., 24 Id., 740.

APPEAL from the district court for Lancaster county.
Heard below before CHAPMAN, J.

Chas. E. Magoon, for appellant, cited: *Deerfield v. Conn. Riv. R. Co.*, 144 Mass., 338; *Mueller v. Fruen*, 36 Minn., 274; Gould, Waters, sec. 329; Angell, Water-

courses, sec. 203 *et seq.*; Washburn, Easements, 84; *Haight v. Price*, 21 N. Y., 241; *Prentice v. Geiger*, 74 N. Y., 341; *Vail v. Mix*, 74 Ill., 127; *Coe v. Mfg. Co.*, 35 Conn., 175; *Tootle v. Clifton*, 22 O. St., 247; *Scheuber v. Held*, 47 Wis., 340; *O. & Ind. R. Co. v. Zinn*, 18 O. St., 417; *Barker v. Salmon*, 2 Met. [Mass.], 32; *Brown v. King*, 5 Id., 173; *Ashley v. Ashley*, 4 Gray [Mass.], 197; *James v. R. Co.*, 91 Ill., 554; *Schall v. R. Co.*, 35 Pa. St., 191; *Day v. R. Co.*, 41 O. St., 392; *Gatling v. Lane*, 17 Neb., 83; *Haywood v. Thomas*, Id., 241; *Fitzgerald v. Brewster*, 31 Id., 51; *Valentine v. Mahoney*, 37 Cal., 389; *Samuel v. Dinkins*, 12 Rich. [S. Car.], 172; *Mann v. Rogers*, 35 Cal., 316; *Harbin v. Roberts*, 33 Ga., 45; *Gregg v. Wells*, 10 Ad. & E. [Eng.], 90; *Chapman v. Chapman*, 59 Pa. St., 214; *Crest v. Jack*, 3 Watts [Pa.], 238; *Woods v. Wilson*, 37 Pa. St., 383; *Brooks v. Curtis*, 4 Lans. [N. Y.], 283; *Bourdier v. R. Co.*, 35 La. Ann., 949; *Goodin v. Canal Co.*, 18 O. St., 179; *Kellogg v. Ely*, 15 Id., 64; *State v. Graham*, 21 Neb., 355; Taylor, Landlord & Ten., sec. 180; *Forbes v. Caldwell*, 39 Kan., 19; *Doe v. Reynolds*, 27 Ala., 364; *Jackson v. Haviland*, 13 Johns. [N. Y.], 229; *Smith v. Trabue*, 1 McLean [U. S.], 87; *Smith v. Hornback*, 4 Litt. [Ky.], 232; *Wheeler v. Ryerss*, 4 Hill [N. Y.], 467; *Hopkins v. Calloway*, 7 Cold. [Tenn.], 37; *Oetgen v. Ross*, 47 Ill., 142; *Smith v. Pretty*, 22 Wis., 655; *Cadwallader v. Harris*, 76 Ill., 370; *Magwire v. Labeaume*, 7 Mo. App., 179; *Read v. Allen*, 56 Tex., 180; *Newman v. Bank*, 80 Cal., 371; *Stout v. Tall*, 9 S. W. Rep. [Tex.], 331; *Spotts v. Hanley*, 85 Cal., 155; *Valentine v. Mahoney*, 37 Id., 399; *Calderwood v. Brooks*, 28 Id., 152; *Wheelock v. Warschauer*, 34 Id., 265; *Dutton v. Warschauer*, 21 Id., 620; *Douglas v. Fulda*, 45 Id., 592; *Shay v. McNamara*, 54 Id., 175; *Chant v. Reynolds*, 49 Id., 213; *Richardson v. Pickering*, 41 N. H., 386; *State v. Holloway*, 8 Blackf. [Ind.], 47; *Dodge v. R. Co.*, 20 Neb., 276; *Barker v. Salmon*, 2 Met. [Mass.], 32; *Finlay v.*

Cook, 54 Barb. [N. Y.], 9; *Tyler*, Eject., 873; *Stettinische v. Lamb*, 18 Neb., 626; *Pullman Car Co. v. M. P. R. Co.*, 115 U. S., 587.

Lamb, Ricketts & Wilson, contra, cited: *Powell v. Bagg*, 8 Gray [Mass.], 441; *R. Co. v. Danberg*, 2 Saw. [U. S.], 452; *Hazelton v. Putnam*, 3 Pin. [Wis.], 107; 3 Washburn, R. Prop. [5th Ed.], 144, 315, 362; *McCall v. Neely*, 3 Watts [Pa.], 71; *Wheeler v. Bates*, 21 N. H., 460; *Drew v. Westfield*, 124 Mass., 461; *Slater v. Rawson*, 6 Met. [Mass.], 439; *Smith v. Burtis*, 6 Johns. [N. Y.], 216; *Cooper v. Smith*, 9 S. & R. [Pa.], 26; *Cagle v. Parker*, 2 S. E. Rep. [N. Car.], 76; *Morse v. Copeland*, 2 Gray [Mass.], 302; *Smith v. Miller*, 11 Id., 145; *C. & N. W. R. Co. v. Hoag*, 90 Ill., 349; *Tinkham v. Arnold*, 3 Me., 120; 2 Greenl., Ev., 539; *Edson v. Munsel*, 10 Allen [Mass.], 568; *Parker v. Foote*, 19 Wend. [N. Y.], 309; *Sargent v. Ballard*, 9 Pick. [Mass.], 251; *Daniels v. C. & N. W. R. Co.*, 35 Ia., 129; *Colvin v. Burnet*, 17 Wend. [N. Y.], 564; *Pierre v. Fernald*, 26 Me., 440; *Liford's Case*, 11 Coke [Eng.], 51; *Dewey v. Osborne*, 4 Cow. [N. Y.], 329; *Dunn v. Miller*, 75 Mo., 272; *Read v. Allen*, 56 Tex., 176; *Newman v. Bank*, 80 Cal., 368; *Stout v. Tall*, 9 S. W. Rep. [Tex.], 321; *Spotts v. Hanley*, 24 Pac. Rep. [Cal.], 741; *Reynolds v. Willard*, 22 Id., 261; *Watkins v. Peck*, 13 N. H., 360; *New Orleans v. Shakespeare*, 39 La. Ann., 1033; *Ward v. Parlin*, 30 Neb., 384, and cases cited; *Hoagland v. Lusk*, 33 Neb., 376; *Viele v. Judson*, 82 N. Y., 40; *Earl v. Stevens*, 57 Vt., 478; *Crossmon v. May*, 68 Ind., 244; *Stockman v. Land Co.*, 28 Pac. Rep. [Cal.], 117; *Allen v. Shaw*, 61 N. H., 97; *Taylor v. Ely*, 25 Conn., 250; *Stevens v. Dennett*, 51 N. H., 342; *Patterson v. Hitchcock*, 3 Colo., 536; *Griffith v. Wright*, 6 Id., 250; *Pitcher v. Dove*, 99 Ind., 178; *Monks v. Belden*, 80 Mo., 639; *Bales v. Perry*, 51 Id., 449; *Staton v. Bryant*, 55 Miss., 261; *Wazata v. R. Co.*, 49 N. W. Rep. [Minn.], 205; *Fer-*

guson v. Millikin, 42 Mich., 441; *Royce v. Watrous*, 73 N. Y., 597; *Buckingham v. Hanna*, 2 O. St., 551; *Henshaw v. Bissell*, 18 Wall. [U. S.], 255; *Brant v. Coal Co.*, 93 U. S., 326; *Lance's Appeal*, 55 Pa. St., 25; *Odneal v. Sherman*, 14 S. W. Rep. [Tex.], 31; *Lyon v. McDonald*, Id., 261; *Hahn v. Baker Lodge*, 27 Pac. Rep. [Ore.], 167; *Dennis v. Spencer*, 47 N. W. Rep. [Minn.], 795; *Ger. Ins. Co. v. Fairbanks*, 32 Neb., 750; *Mabary v. Dollarhide*, 11 S. W. Rep. [Mo.], 611; *Bruce v. Platt*, 80 N. Y., 379; *Hollingshead v. Woodard*, 107 Id., 96; *Mumma v. Potomac*, 8 Pet. [U. S.], 286; *Dobson v. Simonton*, 86 N. Car., 492; *Phillips v. Wickham*, 1 Paige Ch. [N. Y.], 595; *Briggs v. Penniman*, 8 Cow. [N. Y.], 387; *Gains v. Bank*, 12 Ark., 769; *Christian Soc. v. Proctor*, 27 Ill., 414; *Boyce v. M. E. Church*, 46 Md., 359; *Greenwood v. R. Co.*, 10 Gray [Mass.], 373; *M. R. & Ft. S. R. Co. v. Shirley*, 20 Kan., 660; *Greeley v. Smith*, 3 Story [U. S.], 657; *Natl. Bank v. Colby*, 21 Wall. [U. S.], 615; *Alexandria v. Fairfax*, 95 U. S., 774; *Strickland v. Prichard*, 37 Vt., 324; *Mfg. Co. v. Marsh*, 1 Cush. [Mass.], 507; *Mahone v. R. Co.*, 111 Mass., 75; *President M. & M. Co. v. Coquard*, 40 Mo. App., 40.

MAXWELL, CH. J.

On the 30th day of September, 1885, Charles J. Hull commenced an action in ejectment in the district court of Lancaster county against the Chicago, Burlington & Quincy Railroad Company, Humphrey Bros. Hardware Company, and S. A. Brown & Co. to recover possession of lots 14, 15, 16, and 17 in block 70 of Lincoln. April 15, 1886, the defendant railroad company filed an amended answer, presenting the following defenses:

First—General denial.

Second—Condemnation proceedings by the Burlington & Missouri River Railroad Company in December, 1879.

Third—Ten-year statute of limitations.

Fourth—That the Chicago, Burlington & Quincy Railroad Company with its predecessors, the Burlington & Missouri River Railroad Company and the Nebraska Railway Company, had been in open, notorious, and exclusive possession of said lots since July, 1874.

All the allegations of this answer were put in issue by the reply. A trial to the court, a jury having been waived, resulted in a judgment for plaintiff Hull as to lots 14 and 17, and for the defendant railroad company as to lots 15 and 16. The case was then brought to this court by Hull upon error, both parties filing petitions in error. Upon a hearing in this court the judgment of the court below was affirmed so far as it was in favor of Hull and reversed so far as it was against him. The opinion in that case is reported in *Hull v. C., B. & Q. R. Co.*, 21 Neb., 371. The case went back to the district court, and upon leave the defendant railroad company filed another amended answer, in which the following defenses were interposed:

First—General denial.

Second—That the Nebraska Railway Company in 1874 took open, notorious, and public possession of said lots, and condemned them as required by law, and by itself and its lessees, the Burlington & Missouri River Railroad Company in Nebraska and the Chicago Burlington & Quincy Railroad Company, had continuous, open, notorious, public, and exclusive possession for more than ten years; that the plaintiff had actual knowledge of the possession, use, and occupancy of the lots by the three companies named, and that plaintiff by his knowledge and silence was estopped to assert his title.

Third—That the Nebraska Railway Company is a necessary party to the action.

Fourth—Ten years statute of limitation.

This answer having been put in issue by a reply, a trial was had on the 14th day of September, 1887, resulting in a judgment for the plaintiff Hull as to lots 15 and 16.

The defendant company prosecuted a proceeding in error to this court to reverse this judgment, which proceeding resulted in affirming the judgment of the court below. This second opinion is found in *C., B. & Q. R. Co. v. Hull*, 24 Neb., 740. On the 15th day of October, 1887, by virtue of a writ of restitution, the sheriff put the plaintiff Hull into possession of lots 14 and 17, and on the same day Hull leased these lots to S. A. Brown & Co., and on the 23d day of February, 1888, Hull's title to lots 15 and 16 having been affirmed by this court, he leased those lots to Humphrey Bros. Hardware Company. On November 1, 1887, the plaintiff herein filed its petition in this case and procured from Judge Field a temporary injunction restraining said Hull from prosecuting the ejectment case heretofore mentioned, and in said petition asked to have the title to said lots quieted in the plaintiff, on the grounds that plaintiff had acquired title by adverse possession, and that Hull was estopped by his conduct from asserting his title. To this petition the defendant Hull filed an answer, setting up the following defenses:

First—Denying the existence of the plaintiff.

Second—That an action to quiet title would not lie, because defendant was in possession of the property.

Third—That the plaintiff, by its general attorney, appeared in the ejectment suit and pleaded the title of plaintiff and procured an adjudication thereof.

Fourth—That the pretended condemnation proceedings taken by the plaintiff in 1876 were void.

Fifth—That by commencing the condemnation proceedings of 1876 the plaintiff recognized the title of defendant and could not claim adversely thereto.

Sixth—That the condemnation money deposited by the plaintiff had been withdrawn.

Seventh—That in 1877 these lots were wholly abandoned for railroad purposes and reverted to the defendant.

Charles J. Hull having died on the 12th of February,

1889, this cause was, on the 1st day of April, 1889, revived in the name of Helen Culver, sole devisee under the will. Plaintiff replied by a general denial, and the cause coming on for trial to the court on the 6th day of December, 1889, a decree was rendered dismissing the plaintiff's bill, whereupon the case was brought to this court on appeal.

The testimony shows that in the year 1875 the Midland Pacific railway located its line over a portion of these lots. Afterwards, in the same year, the Midland company was consolidated with the Brownville, Fort Kearney & Pacific Railway Company. The new corporation was called the Nebraska Railway Company. In December, 1875, the Nebraska Railway Company attempted to condemn the lots in controversy and deposited the amount at which they were appraised with the county judge of Lancaster county. This deposit was withdrawn in the year 1880. In June, 1877, the Nebraska Railway Company leased its line of road to the Burlington & Missouri River Railroad Company for the term of 999 years. The terms of the lease would indicate that it was practically a conveyance. The lease is as follows :

"It is agreed by and between the Burlington & Missouri River Railroad Company in Nebraska, of the one part, and the Nebraska Railway Company, of the other part:

"First—That the Nebraska Railway Company shall lease and demise, and it does hereby lease and demise, to the Burlington & Missouri River Railroad Company in Nebraska all of its railroad, depot grounds, depots, franchises, and property in use or connected with or that hereafter may be acquired for the use of said railroad, but excluding all land received from the state of Nebraska or other sources, except right of way, or depot grounds used, or to be used for the operation of its road, to have and to hold for the period of 999 years from the date hereof.

"Second—The Burlington & Missouri River Railroad

Neb. Ry. Co. v. Culver.

Company in Nebraska agrees to pay as and by way of rent, in the manner hereinafter stated, the earnings of said road after deducting what in the judgment of said company shall be the necessary expenses for the operation of the same, and for placing and keeping the same in good running order, and all taxes; that is to say, the said net earnings are to be first applied by the said Burlington & Missouri River Railroad Company in Nebraska to the payment, first, of interest, and, next, of the principal of the first mortgage bonds which have been issued on said railroad from Brownville to the city of Seward, in Seward county, Nebraska, at the rate of \$20,000 per mile of road, bearing interest at the rate of seven per cent per annum, free of United States tax, and, second, the residue to be paid over to the lessors.

"In witness whereof, the said parties have caused their corporate seals to be hereunto affixed, and the same to be subscribed by their respective presidents, on this 5th day of June, A. D. 1877.

"[SEAL.] NEBRASKA RAILWAY COMPANY,
 "By B. G. SMITH, *President*.

" Attest :

 " CHAS. D. SMITH, *Secretary*.

"[SEAL.] THE BURLINGTON & MISSOURI RIVER
 RAILROAD COMPANY IN NEBRASKA,
 " By GEORGE TYSON, *President*.

Attest:

 " J. W. DENNISON, *Secretary*."

The principal contention of the plaintiff is that it has acquired title by adverse possession. We think differently, however. The proof clearly shows that it recognized the title of Hull in attempting to condemn his property and the deposit of the money with the county judge. This money, had the condemnation been legal, represented the land condemned.

It is claimed on behalf of the plaintiff that the money

was withdrawn without its knowledge or consent; whether so or not is not material in this case. The money remained as the purchase price of the land, and was withdrawn by the beneficiary under the lease, and an attempt made to recondemn the land in question. It is very clear, therefore, that the plaintiff was not in possession adversely for more than ten years prior to the time that Hull instituted the action in ejectment. We do not decide that the statute of limitations will or will not run in favor of a railway company, as the question does not arise. In addition to this, these questions were fully adjudicated in *Hull v. C., B. & Q. R. Co.*, 21 Neb., 371. In the opinion in that case Judge REESE very fully states the reasons why the railway should not recover, as follows: The statute requiring the notice to be published in "some newspaper published in the county" clearly means that the whole publication shall be made in one paper "four consecutive weeks." This was not done, and no jurisdiction was acquired. Virtually no notice was given. The proceedings constitute no justification. (*R. Co. v. Fink, supra.*)

The next question presented is as to the statute of limitations. This point in the case is referred to but not discussed by defendant in error in its brief. It is true that defendant in error and its predecessors were in possession of a part, if not all, of the property in dispute more than ten years prior to the commencement of this suit. But we cannot see how it can be held that this possession was, during all of the time alluded to, adverse to the title or ownership of plaintiff. In the first instance the title and ownership of plaintiff, or some other person unknown, perhaps, was recognized by the condemnation proceedings of 1875. The damage to the owner as found by the appraisers was placed to his credit with the county judge, where it remained until it was withdrawn in 1880. Had it not been for the fact at that time new proceedings had been instituted against plaintiff by name

as the owner, it might be that subsequent to that date the possession of defendant would have been adverse. But by that proceeding his title and ownership were directly admitted and recognized, and on the 7th day of April, 1880, the condemnation money found due by the appraisers was deposited with the county judge as plaintiff's damages. These acts amount to a clear and definite acknowledgment of plaintiff's ownership of the property, and would arrest the statute of limitations even if it had commenced to run. (*Erskine v. North*, 14 Gratt. [Va.], 60; *Walbrunn v. Balben*, 68 Mo., 164; *Wood on Limitations*, 578; *Lovell v. Frost*, 44 Cal., 471; *Dietrick v. Noel*, 42 O. St., 18; *Stump v. Henry*, 6 Md., 201; *Tyler on Ejectment and Adverse Enjoyment*, 125 and 921; *Koons v. Steele*, 19 Pa. St., 203.) We hold, therefore, that neither the condemnation proceedings, nor the statute of limitations, as shown by the evidence on the trial, constituted a defense to plaintiff's action. This decision was adhered to in the same case in 24 Neb., 740. These decisions settle the rights of the parties, and the attempt to relitigate in this case the question which is already determined should not be encouraged. The decision of the court below is right and is

AFFIRMED.

THE other judges concur.

THEO. OLESON ET AL. V. CITY OF PLATTSMOUTH
ET AL.

[FILED JULY 1, 1892.]

1. **Negligence: DAMAGES FROM CONSTRUCTION OF SEWER: REVIEW.** In an action against a contractor for the construction of a sewer for damages to a brick building from settling, caused by the negligence of the contractor in the excavation for the sewer, *held*, that, in view of the sharp conflict in the evidence, the judgment of the court below would be affirmed.
2. ———: ———. The contractor was justified, as shown by the evidence, in not prosecuting the work at night or on Sundays.

APPEAL from the district court for Cass county. Heard below before CHAPMAN, J.

John C. Shea, for appellants Haubens & Shelton, cited: *Birmingham v. M'Crory*, 4 S. Rep. [Ala.], 631; *Woods, Master & Servant*, sec. 314; *Water Co. v. Ware*, 16 Wall. [U. S.], 566; 2 Dillon, *Mun. Corp.*, sec. 1029; *Wray v. Evans*, 80 Pa. St., 102; *Chicago v. Robins*, 2 Black [U. S.], 418.

C. S. Polk, contra.

MAXWELL, CH. J.

This cause originated by Haubens & Shelton entering into a written contract with the city of Plattsmouth to construct a sewer in said city, under the instructions and according to the plans and specifications given by the city. The sewer was constructed during the year 1889 through an alley for some distance, and which alley was on block 35, bounded on either side by brick buildings, which, at the point where the principal damages complained of occurred, were the property of Henry Boeck. Haubens & Shelton gave a bond for the fulfillment of the contract.

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After the sewer was completed these claims for damages to adjacent property owners were filed with the city council, one each by Boeck, White, and Dovey. By the conditions of their contract five per cent of the contract price was held back for six months, amounting in this case to \$2,165, which, with interest at time of trial in district court, amounted to \$2,231.47. The original case, as instituted, was by the bondsmen of the contractors, Theo. Oleson *et al.*, to enjoin the city from paying over this five per cent indemnity until the damages were settled, and upon the issues as then joined no question is now being litigated, as no one is contesting them, but the injunction still remains in force. Afterwards amended pleadings were filed and the issue changed to a contest between the contractors and city over the aforesaid five per cent indemnity.

By the provisions of the contract the city was to furnish plans and specifications by which to construct said sewer, which also provided that it shall be built subject to the directions of the engineer placed in charge of said work by the party of the first part, subject to the acceptance of the said work by the engineer and board of public works and approval thereof by the mayor and council," and the contract contains the following provisions:

"Sec. 18. Haubens & Shelton, contractors, expressly bind themselves to indemnify and save harmless the city of Plattsmouth from all suits or actions of every name or description brought against the city, for or on account of any injury or damage received or sustained by any party or parties by or from Haubens & Shelton, or their servants or agents, in the construction of said work, or by or in consequence of any negligence in guarding the same, or any improper materials used in its construction, or by or on account of any act or omission of the said Haubens & Shelton, or their agents."

On the trial of the cause a jury was waived and the court found the issues and rendered judgment as follows:

"On the 28th day of June this cause came on to be heard on the pleadings filed in this case and upon the evidence, and was submitted to the court and taken under advisement.

"And now on this 11th day of August, 1890, the court, having been fully informed and advised in the premises, finds that there is due from the city of Plattsmouth, defendant, to the defendants Haubens & Shelton, sewer contractors, the sum of \$652.03; that in the building and construction of the sewer through the alley in block 35, in Plattsmouth city, defendants Haubens & Shelton were guilty of negligence and want of due care, and thereby caused the damage to buildings and improvements of Henry Boeck in the sum of and amount of \$1,500, and that under the contract between said city and its co-defendants Haubens & Shelton said Haubens & Shelton are liable to said city for the amount of such damages, together with the costs incurred in and about the prosecution of the said suit between the said city of Plattsmouth and said Henry Boeck, which costs amount to the sum of eighty-five and $\frac{38}{100}$ dollars; and that the said city had the right to withhold said sum of \$1,500 from the amount due said contractors, together with the sum of \$85.38, costs incurred in the said suit against the city of Plattsmouth.

"The court further finds as a matter of fact that Haubens & Shelton had due notice of the pendency of the said action between the city of Plattsmouth and Henry Boeck and were present in court, represented by counsel, when said cause was tried and assisted in the defense thereof.

"It is therefore considered by the court that Haubens & Shelton recover from the said city of Plattsmouth the sum of \$625.03 and costs of this action; and that said city shall withhold the sum of \$1,585.38 of the amount due said contractors, and the injunction heretofore granted in this case be dissolved."

The sewer seems to have been well constructed, of good

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material, and according to the plans and specifications. Under the contract the contractors would not be liable for damages unless they were negligent in the performance of their contract, whereby another sustained damages. The only negligence proved was the great delay in passing the brick building of Henry Boeck, which he testifies was about thirty days, and on the part of the contractor is stated to be two weeks. Boeck claims that he insisted that the contractors should procure a sufficient light and cause the men to work nights, also that they should have worked on Sundays, and that he requested them to do so, which they refused to do. The overseer to supervise the work testifies that he refused permission to work at night, as such work was liable to be defective, and this is not denied. As to the neglect to work on Sundays we think the contractors were perfectly justified in their refusal. Sunday is a day of rest. Experience has demonstrated the necessity of the Divine law creating the Sabbath in order that both the minds and bodies of men may recuperate from the labors of the week. Works of necessity or mercy are excepted, but the necessity which will justify labor must be pressing and immediate. If it can be deferred until the following or succeeding day, there is no justification for working on Sunday. This leaves but one question, viz, Was there undue delay in the construction of the sewer after the excavations therefor were made? The alley at that point is thirteen feet in width, and the completed sewer is nearly ten feet in width. The excavation for the sewer extended several feet below the footing of the walls of Boeck's buildings. This excavation, according to his testimony, remained open for a long time, and was the direct cause of his building settling, and the cause of the injury.

On the part of the contractors it is shown that Boeck had a cistern in his cellar near the sewer which would contain about 130 barrels of water; that the cistern was full of water; that Boeck said nothing about this to the con-

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tractors, but the water leaked through the wall into the excavation, when they investigated the cause and found the cistern, which they caused to be emptied of its contents at once. It is pretty evident that the testimony in regard to the cistern is in the main correct, and under proper issues would have been a question for a jury.

It is impossible in the condition of the record for this court to say to what extent, if at all, it caused the injury. The injury was, no doubt, caused by the deep excavation which was necessary in order to bring the bottom of the sewer to the grade established by the engineer, but the contractor should have used reasonable diligence under all the circumstances to prevent injury, and the proof upon the question of diligence is conflicting and nearly equally balanced, and therefore we cannot review the facts. The judgment is

AFFIRMED.

THE other judges concur.

WILLIAM RUDOLPH, APPELLANT, v. E. F. DAVIS ET
AL., APPELLEES.

[FILED JULY 1, 1892.]

Review. Where the testimony is conflicting and does not preponderate in favor of either party to such an extent as to show that it is clearly wrong, the judgment will not be set aside.

APPEAL from the district court for Gage county. Heard below before BROADY, J.

A. D. McCandless, for appellant.

Pemberton & Bush, contra.

MAXWELL, CH. J.

This action was brought in the district court of Gage county to enjoin the sheriff of that county from selling certain real estate. The plaintiff alleges in his petition "that on the 8th day of November, 1887, the defendant Julius Kuhn obtained a judgment against one Philip Hornberg before H. G. Mecklin, a justice of the peace in and for Gage county, for \$134.80 and the costs therein taxed at \$6.25; that on the 21st day of November said Philip Hornberg filed a stay bond in said action, with one I. O. Martin as surety, and which said stay was filed and approved by said justice with knowledge and consent of the attorney for said Julius Kuhn, for the purpose of staying said judgment for three months.

"Second—On or about the 21st day of February, 1888, and at the date of the expiration of said stay, said Philip Hornberg paid said judgment to the attorney of said Julius Kuhn, who received the same and then and there agreed to cancel and satisfy said judgment.

"Third—On the 3d day of March, 1888, notwithstanding said judgment was fully paid, the said Julius Kuhn caused a transcript thereof to be made and filed with the clerk of the district court of Gage county, Nebraska, and on or about the 2d day of August, 1889, said Julius Kuhn caused an execution to be issued on said judgment and levied upon the following described real estate in Gage county, viz.: The southwest quarter of the southeast quarter of section 33, in town 1, range 7 east, and the northeast quarter of the northeast quarter of section 1, town 1, range 6 east; and the defendant E. F. Davis, sheriff as aforesaid, is proceeding to sell said real estate and has advertised the same for sale on the 7th day of September, 1889, under said execution, and will sell said land, unless restrained by this court.

"Fourth—That on the 26th day of February, 1889,

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this plaintiff purchased said land from Philip Hornberg, for value, and took a deed therefor, and is now the owner thereof, and said judgment is a cloud upon plaintiff's title, and the said sale under said execution, if not restrained by this court, will create a cloud on plaintiff's title to said land.

"Fifth—That at the time plaintiff purchased said land said judgment, and all costs made thereon, had been fully paid to the said Julius Kuhn.

"Sixth—Plaintiff has no adequate remedy at law to protect his property from this judgment."

The answer is a general denial.

On the trial of the cause the court found the issues in favor of the defendants and dismissed the action.

The questions presented to this court are whether or not the finding and judgment are against the weight of evidence. It is unnecessary to review the testimony at length. It is sufficient to say that it is conflicting and turns upon the credibility of the witnesses. If the testimony of Philip Hornberg is true, he has been greatly wronged. According to his statements he nearly paid the debt in full and then permitted a judgment to be taken against him for \$135. He is corroborated to some extent, but his testimony fails to reach that degree of certainty to show that the judgment in this case is clearly wrong. The judgment must therefore be

AFFIRMED.

THE other judges concur.

L. A. STALEY v. C. C. HOUSEL ET AL.

[FILED JULY 1, 1892.]

1. **Ejectment: GENERAL DENIAL: EVIDENCE ADMISSIBLE UNDER.** Under a general denial, in an action of ejectment, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means.
2. ———: ———: ———. The defendant, under such an answer, may prove, by any legal evidence which he may have, any fact which will defeat the plaintiff's cause of action.
3. **Deeds: FRAUD: EVIDENCE** examined, and *held*, to sustain the finding that the deed from J. B. P. to K. L. C. was procured by fraud and undue means.
4. The instructions given and refused, *held*, properly given and refused.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Estabrook, Irvine & Clapp, for plaintiff in error:

Evidence of fraud or undue influence cannot be given under the general issue in ejectment. (*A. & N. R. Co. v. Washburn*, 5 Neb., 122; *B. & M. R. Co. v. Lancaster Co.*, 7 Id., 37; *Peet v. O'Brien*, 5 Id., 360; *Jones v. Seward Co.*, 10 Id., 161; *Ins. Co. v. Barnd*, 16 Id., 90; *C., B. & Q. R. Co. v. Manning*, 23 Id., 552; *Allen v. Saunders*, 6 Id., 441; *B. & M. R. Co. v. Harris*, 8 Id., 142; *Hamilton v. Ross*, 23 Id., 634; *Young v. Greenlee*, 82 N. Car., 346; *Fish v. Benson*, 71 Cal., 428; *Lombard v. Cowham*, 34 Wis., 486; *Taylor v. Courtney*, 19 Neb., 196; *Fairbanks v. Long*, 91 Mo., 628.)

Jno. L. Webster, contra:

Granting that the defense made—that the deed from Plummer to Christopher was obtainable by fraud—was an

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equitable defense, still it was admissible under a general denial. (*Franklin v. Kelley*, 2 Neb., 80; *Armstrong v. Brownfield*, 32 Kan., 116; *Clayton v. Sch. Dist.*, 20 Id., 256; *Buzzell v. Gallagher*, 28 Wis., 678; *Catlin v. Bennatt*, 47 Tex., 165; *Ayers v. Duprey*, 27 Id., 604; *Johnson v. Byler*, 38 Id., 606; *Mayer v. Ramsey*, 46 Id., 371; *McCall v. Carpenter*, 18 How. [U. S.], 297; *Jackson v. Myers*, 11 Wend. [N. Y.], 533; *Wicks v. Smith*, 18 Kan., 508; *Stout v. Hyatt*, 13 Id., 242; *Mather v. Hutchison*, 25 Wis., 27; *Begg v. Begg*, 56 Id., 534; *Carter v. Scaggs*, 38 Mo., 302; *Brown v. Brown*, 45 Id., 412; *Meyers v. Gale*, Id., 416; *Williams v. Barnett*, 52 Tex., 130; *Warren v. Jacksonville*, 15 Ill., 236; *Stubblefield v. Borders*, 92 Id., 279; *Semple v. Cook*, 50 Cal., 29; *Willson v. Cleaveland*, 30 Id., 201; *Bell v. Bed Rock*, 36 Id., 219; *Kimball v. Gearhart*, 12 Id., 50; *Bell v. Brown*, 22 Id., 672; *Kent v. Agard*, 24 Wis., 378.) The jury was justified in finding that the deed was obtained by fraud and void. (*Burch v. Smith*, 15 Tex., 219; *Pickett v. Pipkin*, 64 Ala., 520; *Linn v. Wright*, 18 Tex., 337; *Bigelow*, Fraud, 2, 71, 190, 191; *Turner v. Turner*, 44 Mo., 535; *Todd v. Grove*, 33 Md., 188; *Bailey v. Litten*, 52 Ala., 282; *Mead v. Coombs*, 26 N. J. Eq., 173; *Bailey v. Woodbury*, 50 Vt., 166; *Leighton v. Orr*, 44 Ia., 679; *Moore v. Moore*, 56 Cal., 89; *Dean v. Negley*, 41 Pa. St., 312; *Coulson v. Allison*, 2 De G., F. & J., 521; *Hargreave v. Everhard*, 6 Ir. Ch. Rep., 278; *Farmer v. Farmer*, 1 H. L. Cas. [Eng.], 724; *Bayliss v. Williams*, 6 Cold. [Tenn.], 440.) The deed from Plummer to Christopher being without consideration and obtained by social influences, she and her grantee may be decreed to hold the property in trust and compelled to reconvey at the suit of the grantor or his heirs. (*Nichols v. McCarthy*, 53 Conn., 299; *Archer v. Hudson*, 7 Beav. [Eng.], 560; *Anderson v. Ellsworth*, 3 Giff. [Eng.], 154; *Munson v. Carter*, 19 Neb., 293.)

NORVAL, J.

This is an action in ejectment brought by plaintiff in error to recover the possession of lot 8 in block 352, in the city of Omaha, and damages for withholding said premises from plaintiff. The petition is in the ordinary form.

The defendants for answer deny that plaintiff is the legal owner of the lot or entitled to the possession of the same, or that defendants wrongfully withheld possession thereof; aver that defendants and their grantors have had adverse possession of the lot under a claim of title for more than ten years prior to the bringing of this action. The answer further alleges:

“Fourth—The defendants for further answer say that said plaintiff claims title, under and by virtue of a deed made and executed to him by one Kate Graham, formerly Kate Christopher, and that said Kate Christopher obtained her title by conveyance from one Jesse B. Plummer in the year 1868, and these defendants further say that said deed of conveyance from said Plummer to said Christopher was without any consideration and was obtained by said Kate Christopher from said Jesse B. Plummer by fraud and deception practiced upon him, the said Plummer, by her, the said Kate Christopher, and that said Kate Christopher was only to hold said title in trust for said Plummer, his assignees and devisees, and that said Kate Christopher was not to have, and did not claim to have, any legal title in or to said premises by virtue of said deed to her, and that the same was retained by her in fraud of the rights of said Plummer and of his assigns and devisees. That said Plummer in his lifetime made and executed a will by which he devised said real estate to one Valentine, and that said Valentine afterwards, by deed duly executed, conveyed her interest in said property to these defendants.”

The answer also sets up that the conveyance from Graham to plaintiff was without consideration and was

made for the purpose of enabling him to bring this suit; that defendants have paid taxes on the lot in the sum of \$2,000 and made lasting improvement thereon of the value of \$2,000.

Each allegation of the answer is denied by the reply filed by plaintiff.

From a verdict and judgment in favor of defendants plaintiff prosecutes error.

The evidence discloses that on and for several years prior to the 10th day of February, 1868, the lot in litigation was owned by one Jesse B. Plummer, he having purchased the same at a sale under a decree of foreclosure as the property of one C. J. Christopher, the former husband of Kate L. Christopher and the immediate grantor of plaintiff. Prior to the sale Christopher disappeared and is supposed to be dead. At the time Plummer bid in the property, Kate Christopher was residing thereon and for many years afterwards she and Plummer lived together upon the premises, occupying the same house. On February 10, 1868, said Jesse B. Plummer conveyed the property in dispute by deed of general warranty to said Kate L. Christopher, reserving to the grantor a life estate, which deed was duly recorded on the same day. On November 3, 1869, said Kate L. Christopher married one George Graham. Soon thereafter they left Omaha, leaving Plummer in possession of the premises, and have not since resided there. The lot was conveyed by deed of quitclaim on the 17th day of May, 1884, by said Kate L. Graham to the plaintiff Lorin A. Staley, which deed was filed for record June 6, 1884.

It further appears from the record that Plummer died in 1887, leaving a last will and testament, bearing date the 20th day of February, 1873, by which all his property, real as well as personal, was devised to his daughter, Ellen Olivia Valentine, which will has been duly admitted to probate. It is contended by defendants that the convey-

ance from Plummer to Kate L. Christopher was without consideration, and that the same was procured by fraud and undue influence, therefore the lot, upon the death of Plummer, passed under the will to his said daughter. The defendants, for the purpose of establishing title to the lot in themselves, introduced in evidence a deed to said lot from said Ellen O. Valentine and her husband, Joseph T. Valentine, to the defendants Charles C. Housel and Reuben Allen, bearing date December 8, 1883; a deed from said Reuben Allen and wife to the defendant Everett G. Ballou, dated March 31, 1884, for an undivided one-third of the lot; also two tax deeds from the treasurer of Douglas county to the defendant Housel, and also a deed from the treasurer of Douglas county to the defendants Housel and Allen.

The defense of adverse possession is not sustained by the proofs; in fact it is not relied upon in this court, nor was that issue submitted to the jury in the court below. The tax deeds above referred to were void on their face and were therefore insufficient to establish title in the defendants. Nothing is now claimed by counsel for defendants for these treasurers' deeds, and they will not be further considered. It will be observed that plaintiff has shown a complete chain of title to the premises in himself, and therefore was entitled to recover, unless the deed from Plummer to plaintiff's grantor, Kate L. Christopher, was obtained by fraud or undue influence. Whether it was thus procured is one of the principal questions presented by the record. Before entering upon this investigation we will pause to consider whether the evidence produced by the defendants to show fraud was admissible under the issues raised by the pleadings. An objection to its introduction was made on the trial by the plaintiff, which was overruled by the court. The evidence was not admissible under the fourth paragraph of the answer, which we have copied above. The allegation therein of fraud is a mere conclusion. No

fact constituting the fraud is averred. A party charging fraud and undue influence must plead the facts. A mere allegation of their existence is not sufficient. (*Arnold v. Baker*, 6 Neb., 134; *Clark v. Dayton*, Id., 192; *Aultman v. Steinan*, 8 Id., 113.)

The evidence tending to show that the deed from Plummer to Christopher was obtained by fraud and undue influence was, however, admissible under the general denial of the answer. The question was squarely presented and decided in *Franklin v. Kelley*, 2 Neb., 79. It was there held that the defendant, in an action of ejectment, may show that a deed in plaintiff's chain of title was procured by fraud, without specially pleading the fraud in the answer. Chief Justice MASON, in delivering the opinion of the court, says:

"In whatever aspect the offer of the defendants is regarded, it is within the rule that fraud may be shown in ejectment to avoid a deed; and the refusal of the court to hear the evidence was error. One other matter only remains to be noticed. It is insisted that this matter should have been specially pleaded. It is undoubtedly true, that the theory of the system of pleading under the Code generally is, that the facts necessary to constitute a cause of action or defense shall be stated. But, in respect of actions for the recovery of real property, another rule has been adopted. Why this is so is not very clear. It may be because, as two trials, of course, are given in that class of actions, the parties are supposed to learn, from what is shown on the first, what will be the issue on the final trial. But, whatever the reason, it is apparent that in this class of actions, as also in cases of replevin, the facts need not be stated. That being the rule of pleading contained in the Code, we have only to enforce it here."

The decision has never been directly overruled, nor its soundness questioned, but the same principle was recognized and applied by this court in *Dale v. Hunneman*, 12

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Neb., 221. That was an action of ejectment, the answer being a general denial. MAXWELL, Ch. J., in the opinion says: "Where the facts stated in the petition are denied, the plaintiff, to be entitled to recover, must prove that he possesses a legal estate in the premises, and is entitled to the possession of the same. If the defendant possesses an equity which negatives the plaintiff's right of possession, such equity may be proved under a general denial, as it is a mere defense to the action. But if the defendant seek affirmative relief, such as to enforce a contract which does not give him the right of possession, but does give him a right to demand a specific execution of the contract by the plaintiff, upon which the right to continue in possession of the premises depends, he must plead the facts entitling him to such relief. And his answer must contain all the facts necessary to entitle him to such relief."

Numerous cases are cited by defendants' counsel from the courts of other states which sustain the position for which they contend, among others, *Stout v. Hyatt*, 13 Kan., 242; *Clayton v. School District*, 20 Id., 256; *Wicks v. Smith*, 18 Id., 508; *Armstrong v. Brownfield*, 32 Id., 116; *Jones v. Cohen*, 82 N. Car., 75; *Lain v. Shepardson*, 23 Wis., 224; *Mather v. Hutchinson*, 25 Id., 27; *Williams v. Barnett*, 52 Tex., 130; and *Sparrow v. Rhoades*, 76 Cal., 208.

The case of *Mathers v. Hutchinson*, *supra*, is quite in point. The action was to recover real estate, the answer being a general denial. The defendant offered testimony tending to prove that a certain tax deed, under which the plaintiff claimed title, was procured by fraud. The evidence was objected to upon the ground that the facts constituting the fraud were not pleaded in the answer. The court in passing upon the question says: "The complaint was in the ordinary form, and did not disclose the origin of the plaintiff's title. And we have held that in such an action, under such a complaint, the defendant, under the general denial, must be allowed to prove anything which

would defeat the title offered by the plaintiff. Any other rule would place him at a great disadvantage. The plaintiff, not being bound to disclose the title relied on in his complaint, may, at the trial, offer any evidence of title which he pleases. With such a rule as to the plaintiff, it would be manifestly unjust to exclude the defendant from proving that the title offered by the plaintiff was void for fraud or any other reason, because he had not specifically set forth the facts in his answer. It would require him to foreknow and avoid, by specific allegations, a title which the plaintiff was not bound to disclose at all."

After a careful examination of the authorities we are satisfied that the rule is correctly stated in *Franklin v. Kelley* and should be adhered to. The general rules of pleading do not apply to actions like this. The plaintiff is not required to disclose in his petition the origin of his title, nor the facts upon which he relies for a recovery. It is sufficient to aver that he has a legal estate in, and is entitled to, the possession of the property in controversy, and that the defendant unlawfully withholds possession. (Code, sec. 626.) The statute has also provided that in an action of ejectment it is sufficient for the defendant to deny generally the title averred in the petition. (Code, sec. 627.) Under such an answer he may prove any fact tending to show that the plaintiff has not the title or the right of possession to the land in controversy. If the defendant in ejectment desires affirmative relief, he must set up in the answer the facts entitling him thereto. The rule for which plaintiff contends would place the defendant at a disadvantage, as it would oblige him to anticipate the nature of plaintiff's evidence, and allege specifically in his answer a defense to a deed which plaintiff might introduce under his general allegation of title. Such a rule would be not only unjust but contrary to the meaning of the section of Code to which reference has been made.

The case of *Uppfall v. Nelson*, 18 Neb., 533, is cited by

plaintiff, claiming that it, in effect, overrules *Franklin v. Kelley, supra*, upon the question under consideration. What the equities of the defendant in the case cited were, and whether he was seeking affirmative relief without having pleaded the facts in his answer, we are not advised, as the published opinion does not disclose, nor has the writer the record at hand so he can determine the same. If the defendant therein was in the position of seeking affirmative equitable relief, then the decision accords with the views we have expressed above, and is in harmony with the second Nebraska case. There is language used in the opinion of *Uppfalt v. Nelson*, from which the inference could be drawn that any equitable matter relied upon by defendant in an action of ejectment to defeat the title set up by the plaintiff, or his right to possession, to be available must be pleaded in the answer, which is contrary to the principle decided in *Franklin v. Kelley*, and *Dale v. Hunneman*. In so far as there is an apparent or real conflict in the opinions referred to, the two reported in the second and twelfth volumes of our reports, we are of the opinion, upon reason as well as authority, should be adhered to.

Was the jury warranted in finding that the deed from Plummer to Kate Christopher was without consideration and obtained by fraud and undue influence? The evidence clearly shows that at the time the conveyance was executed Plummer was a drinking man, about sixty years of age, feeble physically, irritable in temperament, childish, and at times acted like a person unbalanced mentally. For some time prior to and on the day of the making of the deed Kate Christopher had been living with him in the house on the lot in litigation. The house had three rooms, contained but one bed; Kate Christopher was thirty or thirty-five years of age, strong, vigorous, and intelligent, in appearance handsome and attractive, possessed of no money or property. Plummer was completely under her influence and control. After the making of the deed

she left him and married one Graham. It appears from the testimony of Byron Reed, the officer before whom the acknowledgment was taken, that she paid no money to Plummer when the deed was executed.

Mrs. Johanna Knight testified that she was acquainted with Kate Christopher while she lived with Plummer; that after the death of the latter she called to see witness and they had a conversation in regard to the deed. We quote from the bill of exceptions:

Q. What did she say, if anything, about getting the property?

A. She introduced herself to me as "Mrs. Graham." I said, "I thought you was Mr. Plummer's wife." "No," she said, "I never was married to him; I wasn't his wife." I said to her, "I understood he signed his lot away to you, or you got it away some way from him." She said, "Yes, he signed it to me," she says, "he signed it to me for me to take care of him." "Well," I says, "why didn't you stay with him and take care of him? He died a pauper, and had nothing to take care of himself with." She says, "I couldn't live there with him because he was jealous of me. There was no living with him."

Q. What further was said, if anything, about this deed? Let me ask you if anything was said about the heirs setting aside this deed or trouble that would come from it?

A. I said to her, "What do you intend to do with this property?" She says: "I will sell it if I can." I says to her, "Then I wouldn't touch it. I wouldn't touch heirs' property." Because Mr. Plummer told me he had a daughter, and I says, "Some day, if she is a smart woman, she will come and tear your title all to pieces, because you did not perform your duty to Plummer. We saw him starving and suffering." She said, "She didn't care," and that was her reply.

Q. What was said, if anything, by her about Plummer signing this deed when he didn't know what he was doing?

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A. I said, "It is whispered among the neighbors he deeded this to you when he was delirious from fever." She said, "Of course the doctor was sick, but I don't know but what he had his senses."

Q. Was anything said between you about what Plummer had said about her ceasing to stay with him after he made the deed?

A. I said, "When you persuaded that childish old man"—I was in there after taking care of him, because he was suffering from starvation—I said, "what agreement did you make?" She said, "I was to stay with him while he lived, if he secured me, or gave me this property—this lot, so I would have something for my labor." "Now," I said, "Kate"—I was disgusted with her, any way—I said, "you didn't perform your duty. You promised that poor, childish old man that you would stay with him and be his friend, and he died a pauper, dependent on his Omaha friends, in Omaha city." She didn't say one word.

On cross-examination she further testified that Kate Christopher informed her that during the conversation mentioned, Plummer was in bed at the time he signed the deed, but she did not know whether he was delirious or not; that Plummer also told witness on one occasion that "if he ever signed the deed, it was when he did not have his senses."

The testimony of this witness is in no manner contradicted. The record fully discloses that Plummer was completely under the control of Kate Christopher. The testimony, although largely circumstantial in its nature, was ample to justify the jury in concluding that Plummer sustained illicit sexual relations with this woman while they were living together, and that by means of such unlawful cohabitation the weak-minded old man yielded to her demands and was induced to execute the deed without receiving lawful consideration therefor. The entire transaction was so unconscionable that a court of equity will

not uphold it. (*Gibson v. Jeyes*, 6 Ves. [Eng.], 226; *Shipman v. Furniss*, 69 Ala., 555; *Leighton v. Orr*, 44 Ia., 679; *Hanna v. Wilcox*, 53 Ia., 547; *Bivins v. Jarnigan*, 3 Baxt. [Tenn.], 282; Cooley on Torts, 515.)

The defendant Housel had used 4,000 or 5,000 loads of dirt to level the lot; he repaired the house at an expense of \$550, erected fences, moved two houses on the lot, yet Kate Christopher, although aware that these improvements were being made, did not object to the same, thus indicating that she placed but little, if any, reliance in her title. The equities are with the defendants.

Exception was taken to the giving of the first instruction requested by the defendants, which was in this language: "The jury are instructed that the question of determining whether the deed from Plummer to Kate Christopher was obtained by fraud or undue influence is a question peculiarly within the province of the jury to decide from all the evidence, and in determining this question the jury must take into consideration the relationship existing between Plummer and Kate Christopher at and before the time of the making of the deed, the ages of the respective parties, the amount of the consideration, if any, having been paid for the deed, the understanding of the parties as to the condition upon which the deed should be made, if there was any understanding, and all the other circumstances surrounding the transaction."

It is conceded by plaintiff's counsel that the instruction is correct as an abstract proposition of law, but it is claimed that the same was not based upon the testimony, and, therefore, was erroneous. We do not think the criticism merited. There was before the jury testimony tending to prove every matter embraced in the charge of the court. The instruction was pertinent and proper.

The court refused to give the plaintiff's fifth request, which was to the effect that the want of consideration for the conveyance, or the fact that the consideration was ille-

gal and against public policy, was immaterial ; that, although the defendants established such want of consideration, or the illegality of consideration, it would not entitle them to a verdict. While it is true that neither the want of a valid consideration for the deed, nor the fact that it was executed upon an illegal or immoral consideration, would not, of itself, avoid the deed, it does not follow that the proof of such facts was immaterial and should have been disregarded by the jury. They were proper matters to be considered, in connection with the other facts and circumstances appearing in evidence, in determining whether the deed was obtained by undue means. The jury were told in the tenth and eleventh paragraphs of the court's charge that the want of a consideration for the conveyance, or the fact that it was executed to induce the grantee to continue illicit relations with Plummer, would not be sufficient grounds for setting aside the deed. The charge was as favorable to the plaintiff as he had a right to expect, and no error was committed in refusing to instruct as prayed by the fifth request.

Plaintiff's thirteenth and fourteenth instructions were properly refused. They were upon the subject of the ratification of the deed by Plummer. They were erroneous in failing to state that the acquiescence of Plummer in the conveyance, to be binding upon him or those claiming through him, must have been with full knowledge of all the facts affecting the validity of the deed. This element was entirely omitted from the instructions.

Complaint is made because the court refused the following instruction :

"15. If you find that the deed from Plummer to Christopher was procured by fraud or undue influence, but further find that plaintiff paid a valuable consideration for the same, and took said deed without notice of the fraud, your verdict should be for the plaintiff."

We are not surprised at the refusal of the court to so

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instruct, as there are no facts upon which the request could be predicated. Plaintiff is not in the attitude of a good faith purchaser for value without notice. He claims under a quitclaim deed, and there is nothing to show that he ever paid a dollar therefor, except the presumption arising from the amount expressed in the deed, which sum did not exceed one-tenth the real value of the lot at the time of the transfer. Housel was in possession of the premises, therefore plaintiff took his deed with notice of the rights of Housel. Every phase of the case was fairly submitted to the jury. The judgment is

AFFIRMED.

THE other judges concur.

THE WALTON PLOW CO., APPELLANT, V. L. S. CAMPBELL

ET AL., APPELLEES.

[FILED JULY 1, 1892.]

1. Promissory Note: ALTERATION: MAY BE SHOWN UNDER GENERAL DENIAL. In an action to foreclose a real estate mortgage the petition alleges the execution and delivery of the note, to secure which the mortgage was given, and sets out a copy of the note. Held, That evidence showing that the note has been materially altered after its execution was admissible under an answer denying each and every allegation contained in the petition.

2. ——— : ———: WHEN MATERIAL. An unauthorized alteration of a non-negotiable promissory note by the payee, after the execution thereof, by the insertion of the word " bearer " after the name of the payee, is a material alteration, which will nullify the instrument.

3. ——— : ———: BARS RECOVERY. Where a promissory note has been altered by the payee in a material matter and with a fraudulent purpose, no recovery can be had upon the instrument, or upon the original consideration for which it was given.

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|----|-----|
| 86 | 173 |
| 89 | 539 |
| 35 | 173 |
| 44 | 127 |
| 35 | 173 |
| 49 | 438 |

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4. ———: ———: CANCELS THE DEBT. The fraudulent alteration of a promissory note secured by a mortgage cancels the debt which it evidenced and discharges the mortgage.

APPEAL to the district court for Phelps county. Heard below before GASLIN, J.

Atkinson & Doty, for appellants, cited: *Oliver v. Hawley*, 5 Neb., 444; *Vogle v. Ripper*, 34 Ill., 100; *Croswell v. Labree*, 81 Me., 44; *Wilson v. Hayes*, 12 Am. St. Rep. [Minn.], 758; *Shephard v. Whelstone*, 1 N. W. Rep. [Ia.], 753; *Rowley v. Jewett*, 6 Id., 354; *First Natl. Bank v. Carson*, 27 N. W. Rep. [Mich.], 589; *Weaver v. Bromley*, 31 Id., 839; *Greenleaf, Ev.*, sec. 655; *Robinson v. Ins. Co.*, 25 Ia., 430; *Bank v. Shaffer*, 9 Neb., 1; *Gillette v. Smith*, 18 Hun [N. Y.], 10; *Smith v. Smith*, 13 Am. St. Rep. [S. Car.], 633.

S. A. Dravo, and *Leese & Stewart*, contra, cited: *Wilcox v. Saunders*, 4 Neb., 572; *Union Natl. Bank v. Roberts*, 45 Wis., 373; *Croswell v. Labree*, 81 Me., 44; *McCauley v. Gordon*, 64 Ga., 221; *Morehead v. Bank*, 5 W. Va., 74; *Needles v. Shaffer*, 60 Ia., 65; 2 Dan., Neg. Inst., secs. 1410, 1412; *Savings Bank v. Shaffer*, 9 Neb., 1; *Booth v. Powers*, 56 N. Y., 22; *Vogle v. Ripper*, 34 Ill., 100; *Smith v. Smith*, 13 Am. St. Rep. [S. Car.], 633.

NORVAL, J.

This is an action to foreclose a real estate mortgage given by L. S. Campbell and wife to one D. H. Duperon to secure the payment of a promissory note for the sum of \$100, with interest at ten per cent from date thereof. Plaintiff is the owner and holder of said note and mortgage.

The defendants answered denying each and every allegation of the petition. The lower court found the issues in favor of the defendants and dismissed the action.

The court permitted the defendants, over plaintiff's ob-

jection, to introduce testimony tending to prove that the note had been materially altered since its execution by writing in the word "bearer," although the note was non-negotiable when signed. At the close of the trial the defendants, with the permission of the court, filed an amended answer denying each and every allegation of the petition and alleging that on or about the date of the note sued on they executed and delivered to D. H. Duperon a note calling for \$100, due in six months from date; that the note read "D. H. Duperon," the words "or order" being erased by defendants before the same was signed; that after the defendants signed said note, and without their consent, the word "bearer" was fraudulently written therein over the words erased.

The first question presented for our decision is, was evidence showing that the note had been altered after its execution admissible under the general denial in the original answer? We think the answer must be in the affirmative. The petition alleges the execution and delivery of the note by the defendants, and the instrument is set out in the body of the pleading in its altered form. The general denial put in issue every material averment of the petition, and the affirmative was upon the plaintiff to prove the making and delivery of the identical note mentioned in the petition, and so continued to the close of the case. (*Donovan v. Fowler*, 17 Neb., 247; *First Natl. Bank v. Carson*, 30 Id., 107.)

Under a general denial the defendants were entitled to disprove the material facts stated in the petition. Evidence that they did not sign the instrument sued, or that it had been materially altered after delivery, was clearly admissible under the original answer. It is only affirmative defenses that the Code requires to be pleaded. The defense of alteration was not new matter required to be set up in the answer. If the note was altered without defendants' consent, after its execution and delivery, by inserting therein

the word "bearer," then it was not their note, and evidence tending to establish such fact tended to rebut or disprove the evidence offered by the plaintiff, that the defendants made the note described in the petition and introduced on the trial. We do not think it was necessary to allege the alteration in the answer, and the court did not err in receiving the evidence offered on this question under the general denial. (Abbott, Trial Ev., 407; *Boomer v. Koon*, 6 Hun [N. Y.], 645; *Lincoln v. Lincoln*, 12 Gray [Mass.], 45.)

It follows from what has been said that plaintiff was not prejudiced by the filing of the amended answer, as it presented no issue not raised by the general denial of the first answer. No objection was made to the granting permission to file an amended answer, therefore the defendants cannot now urge the ruling as a ground for reversing the case.

It is undisputed that the note, when signed by defendants, was non-negotiable, and that after its delivery, but before the instrument came into the possession of plaintiff it was changed by inserting the word "bearer." The writing of this word in the body of the note changed its character and invalidated the instrument. The alteration is a material one, and, being unauthorized by the makers, no action could be maintained thereon. (*Booth v. Powers*, 56 N. Y., 22; *Union Natl. Bank v. Roberts*, 45 Wis., 373; *Croswell v. Labree*, 81 Me., 44; *McCauley v. Gordon*, 64 Ga., 221; *Morehead v. Bank*, 5 W. Va., 74; *Needles v. Shaffer*, 60 Ia., 65.)

But it is contended by counsel for appellant that the payee having indorsed the note, and plaintiff having received the same in good faith in the usual course of business, the indorsee has a right of action upon the note, notwithstanding the alteration thereof. We cannot agree with counsel in this contention. This court has more than once held that the unauthorized material alteration of a negotiable note

by the payee nullifies the instrument, even in the hands of a *bona fide* holder. (*Palmer v. Largent*, 5 Neb., 223; *Brown v. Straw*, 6 Id., 536; *Davis v. Henry*, 13 Id., 497.)

It is finally insisted the district court erred in ruling that the mortgage given to secure the note was no lien upon the property described in the mortgage; in other words, that plaintiff was entitled to a decree of foreclosure, notwithstanding the alteration of the note it was given to secure. Authorities are to be found which sustain the position contended for by counsel. The leading case so holding is *Gillette v. Powell*, Spear's Eq. [S. Car.], 144. This case was followed by the supreme court of South Carolina in *Plyler v. Elliott*, 19 S. Car., 257, and *Smith v. Smith*, 27 Id., 166; S. C., 3 S. E. Rep., 78. The court of last resort in the state of Illinois has held that where a mortgagee has fraudulently made a material alteration of a note, to secure which the mortgage was executed, the debt is thereby discharged and defeats a foreclosure of the mortgage; but if the alteration, although material, was not made with a fraudulent purpose, it will not have that effect. (*Vogle v. Ripper*, 34 Ill., 100; *Elliott v. Blair*, 47 Id., 342.) So far as we are advised, the question is now presented to this court for the first time.

The effect of a material alteration of a note depends upon the person by whom and the intention with which it was made. If changed by a stranger without the consent of the parties to the instrument, the rights of the holder will not be affected thereby. The material alteration of a note by the payee, although made without any fraudulent intent, renders the paper void, yet the holder may recover in an action brought upon the original consideration. The effect of an alteration of such paper, innocently made under an honest mistake of right, was considered by this court in *Savings Bank v. Shaffer*, 9 Neb., 1, and it was there ruled that while the alteration vitiates the instrument, it would not defeat a recovery upon the original considera-

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tion for which such note was given. The weight of authority is in favor of the doctrine that a fraudulent alteration of a promissory note in a material matter, not only avoids the instrument, but works a forfeiture of the debt for which it was executed. In such case no recovery can be had in any form of action. The law will not permit the holder to take the chances of gain by fraudulently altering the note, without risk of loss in case of detection. (Daniels on Neg. Inst., sec. 1410a; *Newell v. Mayberry*, 3 Leigh [Va.], 250; *Martendale v. Follet*, 1 N. H., 95; *Smith v. Mace*, 44 Id., 553; *Bigelow v. Stilphen*, 35 Vt., 521; *Whitmer v. Frye*, 10 Mo., 349; *Waring v. Smyth*, 2 Barb., Ch. [N. Y.], 135; *Warder, Bushnell & Glessner Co. v. Willard*, 49 N. W. Rep. [Minn.], 300.)

It is inferable from the record that the insertion of the word "bearer" was not made for an honest purpose. Applying the above principles to the case at bar, we are unable to perceive upon what ground it can be held that the mortgage should be enforced. If the fraudulent alteration avoided the note and extinguished the debt, it also discharged the mortgage by which it was secured. The cancellation of the debt released the lien of the mortgage. The plaintiff not only lost his right of action on the note, but on the mortgage as well. (*Sherman v. Sherman*, 3 Ind., 337; *Tate v. Fletcher*, 77 Id., 102; *McCorkle v. Doby*, 1 Stro. [S. Car.], 396.)

In *Gillette v. Powell*, *supra*, it does not appear that the alteration was fraudulently made, hence that case is not an authority on the question under consideration.

The case of *Plyler v. Elliott*, *supra*, was decided by a divided court. The opinion of the majority is placed upon the untenable ground that the fraudulent material alteration of a note does not discharge the debt, but merely takes away all remedy upon the note itself. The writer of that opinion, in substance, contends that, as to the effect upon the debt, there is no substantial difference between that of a note

barred by the statute of limitations and one made void by fraudulent alteration, and that both are controlled by the same principle of law. In this it seems to us that the author of the opinion has fallen into a grave error. The statute of limitations only takes away the remedy, while the fraudulent alteration of a note goes further. It reaches to the debt itself and extinguishes it. The fact that an action can be brought on a mortgage, though the note which it secures is barred, is no ground for holding that the mortgage cannot be enforced in this case to compel the payment of the debt for which the altered note was given. A barred note, so secured by a mortgage, continues as evidence of debt until the statute runs against the mortgage. (*Cheney v. Woodruff*, 20 Neb., 124; *Cheney v. Jansen*, Id., 128.) It is the judgment of this court that the judgment appealed from should be

AFFIRMED.

POST J., concurs.

MAXWELL, CH. J., dissenting.

I am unable to give my assent to the decision of the majority of the court for the following reasons:

The plaintiff brought an action in the district court of Phelps county against the defendants to foreclose a mortgage upon real estate. The action was brought on the 19th day of December, 1889. No answer was filed until the 7th day of April, 1890, which seems to have been the day on which the trial took place, when the defendants, by leave of court, filed a general denial. The note appears to have been introduced in evidence without objection. The defendant, L. S. Campbell, was called as a witness in his own behalf, and testified as follows:

Q. State if that note is in the same condition it was when you signed it.

Counsel for plaintiff objects, as immaterial, irrelevant, and incompetent. Overruled. Plaintiff excepts.

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A. No, sir.

Q. What change has been made, if any?

Objected to, as immaterial, irrelevant, and incompetent.
Overruled. Plaintiff excepts.

A. The word "bearer" has been written in there.

Q. Any words been erased out—were the words "or order" erased?

A. Yes, sir; I erased them myself.

Upon this evidence the court held that there was an alteration and that it was fraudulent; and thereafter, but so far as appears not in open court, permitted an amended answer to be filed to conform to the alleged proof and rendered judgment in favor of the defendants and against the plaintiff, dismissing the action. It is very clear that the court erred in permitting an affirmative defense to be proved under a general denial. The requirement of the Code, that affirmative defenses shall be pleaded, is reasonable and just, and it is the duty of the court to see that this rule is not infringed. If a party has a defense, he must set it forth so that the adverse party may be prepared to meet it. Otherwise, if he rests his case upon a general denial, his proof will be restricted to controverting the facts stated in the petition. To permit a defendant, against the objection of the plaintiff, to prove a defense entirely different from that set forth in his answer, and then amend his answer to conform to his proof, is a gross violation of the rules of pleading and is liable to be fraught with great injustice, and particularly is this true where, as is evident in this case, the wrong was deliberately planned. The plaintiff is the indorsee of the note. He evidently is an innocent purchaser. Now, had the defendant set up in his answer the defense that the note had been altered by adding the word "bearer," the testimony of the payee and others could have been taken and thus the indorsee have been prepared to defend his rights. Here was a snap judgment taken which deprived the plaintiff of a trial

upon the real questions decided, viz., the alteration. That question has not in fact been tried yet. If the defendant may conceal his defense under a general denial and on the trial prove a defense which, in the absence of counteracting proof, will defeat the action, and which the plaintiff, taken by surprise, cannot be prepared to meet, why may he not prove payment, release, accord, and satisfaction, or other defense, and thus the beneficial effects of the Code as to pleading affirmative defenses be lost. This is a step, and a most important one, in that direction. But the defendants, by filing an amended answer, in effect admit that such an answer is necessary.

It is the duty of the courts to uphold honesty and fair dealing and protect and enforce the rights of every one.

From time immemorial courts of equity have granted continuances to permit one or both parties to obtain proof, add new parties or otherwise protect and save their rights, and under the Code this practice is still in force. In addition to this, a court will not determine without a hearing that an alteration is fraudulent. The presumption of innocence prevails until overcome by proof. It is not claimed by the defendants that they have any defense against the note itself that would be defeated by a transfer thereof to an innocent purchaser. How, then, are they defrauded, or can be? They can lose nothing by the transfer. The judgment should be reversed and the cause remanded for trial upon the amended answer.

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NEBRASKA NATL. BANK OF OMAHA V. LOGAN &
STANTON.

[FILED JULY 2, 1892.]

Banks: CHECKS: DISHONOR: DILIGENCE. On Friday, November 16, 1888, the firm of L. & S., of V., Nebraska, drew a check on the State Bank of V., in which they had funds, in favor of M. B. & Co., of O., in this state, and transmitted the same by mail to M. B. & Co. at O. In the letter which contained the check were the words in red ink: "Rush this check through." The check was received by M. B. & Co. on Saturday after its date and by them indorsed and delivered to the Nebraska National Bank for its face value, and without notice to rush the check. The bank at O. had previously had dealings with the State Bank at V. and had found it more prompt in remitting collections than the other banks at that place, and it at once sent the check to the bank on which it was drawn for payment. It was received on Monday morning after its date and on the next day the State Bank transmitted to the Nebraska National a draft on a bank in L., where it had no funds, which check was refused, of which the drawers were duly notified. On Tuesday night after the date of the check the bank at V. stopped payment, and the officers absconded, leaving no money or property of the bank. *Held*, That the Nebraska National Bank had shown reasonable diligence and had acted in good faith and that L. & S. were liable as drawers of the check.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Morris & Beekman, for plaintiff in error, cited: *Titus v. Merchants Bank*, 35 N. J. L., 588; *Russell v. Hankey*, 6 Term Rep. [Eng.], 12; *Griffin v. Rice*, 1 Hilt. [N. Y.], 184; *People v. Merchants Bank*, 78 N. Y., 269; *Fonner v. Smith*, 31 Neb., 107; *Freeholders v. State Bank*, 32 N. J. Eq., 467.

E. G. B. McGilton, contra, cited: *Allen v. Bank*, 22 Wend. [N. Y.], 215; *Striessguth v. Bank*, 44 N. W. Rep.

[Minn.], 797; *Exchange Bank v. Third Natl. Bank*, 112 U. S., 276; *Reeves v. Bank*, 8 O. St., 465; *Simpson v. Waldby*, 30 N. W. Rep. [Mich.], 199; *Titus v. Merchants Bank*, 35 N. J. L., 588; 1 Dan., Neg. Inst., sec., 243; *Commercial Bank v. Union Bank*, 11 N. Y., 203; *Ger. Natl. Bank v. Burns*, 21 Pac. Rep. [Cal.], 714; *Merchants Natl. Bank v. Goodman*, 109 Pa. St., 422; Morse, Banking, sec. 236; *Drovers Bank v. Provision Co.*, 117 Ill., 100; *Forbes v. Bank*, 10 Neb., 338; *Smedes v. Bank*, 20 Johns. [N. Y.], 372; *Bowling v. Harrison*, 6 How. [U. S.], 248; *Van Vechten v. Pruyn*, 13 N. Y., 549; *Smith v. Miller*, 43 Id., 171; Morse, Banking, secs. 421 *d* and *f*.

MAXWELL, CH. J.

The petition in this case was submitted on demurrer in the year 1890 and the petition sustained. In that case the demurrer was overruled and the cause remanded for further proceedings, it being held that if the facts stated in the petition were true the plaintiff had shown due diligence and was entitled to recover. (*Bank v. Logan*, 29 Neb., 278.) Upon the case being remanded, an answer was duly filed by the defendants Logan & Stanton, to which a reply was made. No answer appears to have been filed by McCord, Brady & Co., and on the trial of the cause the case was dismissed by the plaintiff as to them. The parties entered into a stipulation as to the facts as follows:

"It is agreed by the parties hereto that a jury is waived, that this action shall be submitted to the court upon this agreed statement of facts, and that no further evidence shall be introduced, but judgment shall be rendered upon this statement of facts, which the parties agree are all the facts involved in the transaction which is the subject of this action, and which is as follows:

"On Friday, November 16, 1888, the defendants Logan & Stanton, at Valparaiso, Nebraska, drew their check as a copartnership for the sum of \$481.75, payable to the order

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of McCord, Brady & Co., upon the State Bank of Valparaiso, located at Valparaiso, Nebraska, about seventy miles from Omaha, Nebraska, which check reached McCord, Brady & Co. on Saturday, the 17th day of November, 1888, and on the same day the said McCord, Brady & Co. sold and delivered the same by indorsement to the plaintiff, who paid the full amount thereof to said McCord, Brady & Co. On the said Saturday, the 17th day of November, 1888, plaintiff sent said check by mail to the State Bank of Valparaiso with instructions to remit the amount thereof to the plaintiff, which said check was received by the said drawee bank on Monday morning, November 19, 1888. On Tuesday, November 20, 1888, said drawee bank sent to plaintiff a worthless draft on the German National Bank of Lincoln for the amount of said check, said drawee bank having no funds in the German National Bank of Lincoln. Said draft being received by the plaintiff on Wednesday, the 21st of November, 1888, plaintiff refused to accept said draft, having on that day learned of the failure of said drawee bank, and being notified by telegraph from the German National Bank that said drawee bank had no funds to meet said draft. Plaintiff notified said Logan & Stanton on the 22d day of November, 1888, of the non-payment of said check, and that plaintiff, as holder of said check, would look to them for the payment of the same and demanded payment thereof. The defendants Logan & Stanton drew said check and prepared the letter of remittance on said 16th day of November, 1888, just before the time for the departure of the mail for Omaha, between which time and the mailing of the same the circumstance arose which aroused a suspicion in their minds as to the solvency of the drawee bank and in the short time left before the mail was due to leave Valparaiso they had time only to write in red ink across the letter of remittance, 'Rush this check through,' which they did write on the letter of remittance.

"The suspicious circumstance referred to was this: The

said Logan & Stanton received advices from New York that one of the drawee's drafts had gone to protest. Immediately, but after the mail had left for Omaha, an explanation was demanded by Logan & Stanton from the officers of the bank, which explanation was satisfactory to Logan & Stanton, they being informed that the drawee bank had changed its bank of deposit in New York, the dishonored draft having been presented at the New York deposit bank a few hours before the change in deposit had been effected. The said McCord, Brady & Co. did not communicate to the plaintiff the advice given them in the letter of remittance from Logan & Stanton.

"The said drawee bank continued in business and honored all checks presented over the counter during Monday and Tuesday, the 19th and 20th of November, 1888. Logan & Stanton had funds sufficient on deposit to their credit with the said bank to meet the check on said days. Other checks were presented over the counter drawn by Logan & Stanton on said days.

"There was another bank in the village of Valparaiso to which said check might have been sent for presentment and collection, but plaintiff had theretofore had business dealings with both banks in Valparaiso and had found the State Bank of Valparaiso, the drawee of said check, the more prompt in remitting collections.

"At the close of business on Tuesday, the 20th of November, 1888, the drawee bank closed its doors, became insolvent, and never again resumed business, the officers thereof fled to parts unknown, taking all available funds, including the funds of these defendants on deposit for the purpose of meeting said check, leaving no property, real or personal."

On this statement of facts the court below found for the defendant and dismissed the action.

The statement of facts is very unsatisfactory. It is sought to charge the plaintiff with negligence in sending

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the check to the drawee with the request to remit. It seems that it had had some experience with the banks at Valparaiso and had found the drawee bank more prompt in making remittances than the other. The plaintiff would seem, therefore, to have acted in good faith in transmitting the check to that bank.

Upon the agreed statement of facts it is conceded that a draft in favor of the defendants by the Valparaiso bank had gone to protest in New York city a day or two before the check in question was drawn. That the defendants believed there was danger of the bank's insolvency is shown by the words written in their letter to McCord, Brady & Co., "to rush this check through." The only construction that can be placed upon these words is that they believed the insolvency of the bank was imminent. Their explanation that the Valparaiso bank had changed its correspondent at New York is far from satisfactory, particularly as there is no statement that funds had been provided with the new correspondent in that city to meet the defendants' draft. So in regard to what checks were drawn from the Valparaiso bank on Monday and Tuesday preceding the failure.

The case amounts to this: The defendants had notice of facts which would indicate that the Valparaiso bank was about to stop payment. The plaintiff had no such notice. It can scarcely be said, therefore, that the parties were on an equality, or that the check if presented by a third party on Monday and the cash demanded would have been paid. So far as we can see, the insolvency of the bank was apparent to the defendants when the check was drawn, and there must have been some reason not stated in the stipulation why the check was not drawn in their favor and presented by the defendants themselves and their funds withdrawn. We need not speculate upon the reason for such failure, but the agreed statement is not sufficiently definite as to the condition of the bank on Monday and

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Tuesday to warrant us in holding that the check if presented by a third party on either of those days would have been paid in cash. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ELIZA PHILLIPS, APPELLANT, V. OTTO KUHN ET AL.,
APPELLEES.

[FILED JULY 2, 1892.]

Judgments: SATISFACTION BY COMPROMISE: ATTORNEYS: AUTHORITY. One K. recovered a judgment of \$1,000 against one P. for slander. There was some doubt about the correctness of the judgment, and it was supposed the case would be taken to the supreme court. Thereupon the attorneys in the case entered into a compromise that P. should pay the sum of \$600 in full satisfaction of the judgment, which sum was paid and the judgment satisfied of record. Two years afterwards K. moved on notice to set the satisfaction aside upon the ground that he was the sole owner of the judgment and that his attorneys had no authority to compromise the same. The motion was sustained. Afterwards P. brought an action to enjoin the collection of the excess of \$600 and alleged, among other things, that K. owned but half of the judgment and that his attorneys who effected the compromise owned the other half, with other allegations of like character. *Held*, That the petition stated a cause of action and that P. was entitled to equitable relief.

APPEAL from the district court for Platte county. Heard below before MARSHALL, J.

M. Whitmoyer, for appellant:

The compromise and entry of satisfaction was meritorious and should be sustained. (*Boyce v. Berger*, 11 Neb.,

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401; *Treitschke v. Grain Co.*, 10 Id., 361; *Paine v. Wilcox*, 16 Wis., 230-1.) A notice that a motion had been filed to set aside the entry of satisfaction, falls far short of giving the court jurisdiction to make a decree, setting aside the entry. (*Pope v. Hooper*, 6 Neb., 186; *Freeman, Executions*, secs. 81, 83; *Webb v. Anspach*, 3 O. St., 522.)

G. G. Bowman, contra:

An attorney at law has no right to release his client's judgment without his knowledge or consent. (*Kirk's Appeal*, 87 Pa. St., 243; *Levy v. Brown*, 56 Miss., 83; *Nolan v. Jackson*, 16 Ill., 272; *Jackson v. Bartlett*, 8 Johns. [N. Y.], 362; *Brackett v. Norton*, 4 Conn., 517; *Derwort v. Loomer*, 21 Id., 245; *Langdon v. Potter*, 13 Mass., 320; *Hamrick v. Combs*, 14 Neb., 381.) The notice gave ample time to appear and defend, and the court had jurisdiction. (*Bruen v. Bruen*, 43 Ill., 408; *Wilson v. Stillwell*, 14 O. St., 464; *Laughlin v. Fairbanks*, 8 Mo., 367.)

MAXWELL, CH. J.

A demurrer to the amended petition was sustained in the court below and the action dismissed. The petition is as follows:

"That on the 3d day of March, 1885, the plaintiff was, and from thence hitherto and still is, the owner and in possession of the following described real estate, to-wit: Commencing at a point 132 feet south of the northeast corner of lot No. 1 in block No. 85, on formerly Olive street, thence north along said street twenty-two feet, thence west eighty feet along line of business lot No. 5, thence south twenty-two feet to alley, thence east eighty feet to the place of beginning, situated in the city of Columbus, Platte county, Nebraska; also the east third of lot No. 2 in block No. 118, in said city. On or about the 30th day of March, 1885, said Otto Kuhn recovered a

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judgment for the sum of \$1,000 in the district court of Platte county, Nebraska, against said Eliza Phillips, and on or about the 11th day of July, 1885, said judgment was fully paid, satisfied, and discharged, and the same so entered of record on the judgment and execution docket of said court in words and figures as follows, to-wit:

“On July 11, 1885, the within judgment is fully paid and satisfied and the same is hereby discharged.

“McFARLAND & COWDERY,
“CORNELIUS & SULLIVAN,
“By B. R. COWDERY,
“Attorneys for Plaintiff.

“Attest:

“G. HETTKEMPER, *Clerk.*

“By G. B. SPEICE, *Dept.*’

“On the 14th day of September, 1887, a notice was served upon said plaintiff, which is in words and figures following, to-wit:

“In the District Court of Platte County, Nebraska.

“OTTO KUHN }
V.
ELIZA PHILLIPS. }

“The said Eliza Phillips, defendant, is hereby notified that I have filed a motion in said district court to set aside the entry of satisfaction of the judgment in the above entitled cause; that said motion will be heard at the court house in Platte county, on Saturday, the 17th day of September, 1887, at ten o’clock A. M., or as soon thereafter as I can be heard. Affidavits will be used in the hearing of said motion.

“September 13, 1887.

OTTO KUHN,
“By G. G. BOWMAN,
“His Attorney.’

“On the 15th day of September, 1887, a motion was filed in said cause, which is in words and figures as follows, to-wit:

Phillips v. Kuhn.

“In the District Court of Platte County, Nebraska.

“OTTO KUHN }
 v.
ELIZA PHILLIPS. }

“Whereas, on the 30th day of March, 1885, the plaintiff, Otto Kuhn, recovered a judgment against said Eliza Phillips, defendant, for the sum of \$1,000 and costs of suit in a certain action then pending in the district court of Platte county, wherein Otto Kuhn was plaintiff and Eliza Phillips was defendant, which judgment is still in force, unrevoked, and unsatisfied; and whereas, on the 11th day of June, 1885, a certain pretended entry of satisfaction of said judgment was entered on the judgment and execution docket of said district court in the words and figures following, to-wit:

““July 11, 1885. The within judgment is fully paid and satisfied and the same is hereby discharged.

““McFARLAND & COWDERY,

““CORNELIUS & SULLIVAN,

““By B. R. COWDERY,

““*Attorneys for Plaintiff.*”

“The said Otto Kuhn, plaintiff, therefore moves the court to set aside the said entry of satisfaction of the said judgment for the following reasons:

“First—That said Otto Kuhn was the sole owner of said judgment at the time said entry was made.

“Second—That said judgment was not then and never has been fully paid.

“Third—That on the said 11th day of June, 1885, the said B. R. Cowdery, without the knowledge or permission of said Otto Kuhn, and without any legal authority whatever, undertook to compromise said judgment for the sum of \$600, and then and there received upon said judgment said sum of \$600, in consideration of which sum he, the said Cowdery, made said entry of satisfaction; that the said defendant then and there was, and still is, solvent, and

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that said entry of satisfaction was made in fraud of plaintiff's rights; that there is due and owing to said Otto Kuhn from said Eliza Phillips on said judgment the sum of \$400 with interest thereon from March 30 to July 11, 1885.

“OTTO KUHN,
“By G. G. BOWMAN,
“*His Attorney.*’

“On the 17th day of September, 1887, a judgment and decree was rendered upon said motion by said court, which is in words and figures as follows, to-wit:

“In the District Court of Platte County, Nebraska.

“OTTO KUHN }
 v. }
ELIZA PHILLIPS. }

“September 17, 1887. This cause came on to be heard upon the motion of Otto Kuhn, plaintiff, to set aside the entry of satisfaction of the judgment heretofore rendered in said cause, to-wit, on the — day of March, 1885, and the evidence, and was submitted to the court, on consideration whereof the court finds that due notice of the pending of said motion has been given to said Eliza Phillips, defendant; that on the 11th day of June, 1885, there was paid by defendant upon said judgment the sum of \$600, and no more, and that there is still due and unpaid upon said judgment the sum of \$400, together with the interest from the 30th day of March, 1885, at the rate of seven per cent per annum, and that the entry of satisfaction of said judgment was made and entered on the record of said court without any legal authority, and is still null and void. It is therefore considered by the court that the entry of satisfaction of said judgment be, and the same is hereby, vacated, set aside, and annulled, and declared of no force or effect, and that the plaintiff have execution for the sum of \$400 and interest from March 30, 1885, and costs.’

“On or about the 19th day of September, 1887, an execution was issued on said judgment at the instance of said

Phillips v. Kuhn.

Otto Kuhn and placed in the hands of said Daniel C. Kavanaugh, sheriff of said Platte county, who, on the — day of October, 1887, levied the same upon said real estate as the property of said Eliza Phillips, and advertised said real estate for sale on the 28th day of November, 1887, under said execution.

“Plaintiff alleges that said attorneys, McFarland & Cowdery and Cornelius & Sullivan, who made and entered said satisfaction of said judgment, were the duly authorized attorneys in said cause, and had an interest in said judgment to the extent of one-half the value thereof; that said B. R. Cowdery was a member of the firm of said McFarland & Cowdery, and was duly authorized to make said entry of satisfaction of said judgment; that after said judgment obtained March 30, 1885, was rendered against this plaintiff she was about to institute proceedings in court to contest said judgment and have the same annulled and set aside, for which purpose she employed attorneys and had a petition prepared in the month of June, 1885, a copy of which said petition is hereto attached and made a part of this petition, marked Exhibit ‘A’; that each and every allegation of said petition hereto attached is true, and was made in good faith; that said Otto Kuhn and his said attorneys became informed of the purpose of said Eliza Phillips to contest said judgment, and for the purpose of avoiding the uncertainties of the regularity and validity of said judgment and having the same set aside, and to avoid further litigation concerning the same, in consideration whereof said McFarland & Cowdery and Cornelius & Sullivan, attorneys for said Kuhn in said cause, with the full knowledge, consent, and direction of said Otto Kuhn, entered into and made a compromise agreement with said Eliza Phillips, by which it was mutually agreed that the said Eliza Phillips should pay, and the said Otto Kuhn should receive, the sum of \$600 in full payment and satisfaction of said judgment; that said sum of \$600 was thereupon by said Eliza

Phillips paid, and said amount was by said Otto Kuhn received in full satisfaction and discharge of said judgment, and said entry of satisfaction and discharge of said judgment and said entry of satisfaction of said judgment, on the 11th day of July, 1885, was duly made and authorized. Said judgment rendered on the 17th day of September, 1887, vacating and annulling said entry of satisfaction of said judgment and awarding execution, should be set aside and vacated for the following reasons:

“First—Said entry of satisfaction of said judgment was made in good faith and for good and valid consideration and ought in justice to remain in full force and effect.

“Second—That said notice of said motion to set aside said entry of satisfaction was not served a reasonable time before the hearing of said motion to give defendant an opportunity to defend.

“Third—That said motion did not emanate from the court, or by the direction of the court.

“Fourth—Said motion was unauthorized.

“Fifth—Said notice was insufficient to give the court jurisdiction over the defendant.

“Sixth—Said motion was false in the following recital: ‘That I have filed a motion in said district court to set aside the entry of satisfaction of the judgment in the above entitled cause.’ No such motion had been filed before service of said notice.

“Seventh—Said motion was false in stating that affidavits would be used in the hearing of said motion. No affidavits were filed or used in the court.

“Plaintiff further alleges that after said judgment was satisfied and discharged, said real estate was duly mortgaged by said plaintiff for the sum of \$1,200, with the full knowledge and belief of said mortgagor and mortgagee that said judgment was fully discharged and no longer a lien upon said premises, which said mortgage lien is still wholly unpaid and in full force; that if the satisfaction

and discharge of said judgment is not allowed to be and remain in full force and effect, said mortgagee will be deprived of his right to a prior lien upon said premises and his rights will be greatly impaired and imperiled, to the great injury and injustice of said mortgagee; that plaintiff has no adequate remedy at law, and a sale of said real estate will cast a cloud upon plaintiff's title to the same.

"The plaintiff therefore prays for an order restraining the sale of said real estate under said execution and that on the final hearing of said cause said injunction be made perpetual and that said judgment annulling and setting aside said entry of said judgment be canceled and vacated, and for such other relief as is just and equitable."

Exhibit "A" is attached to the petition, from which it appears that the original action was brought against Eliza Phillips for "willfully and maliciously contriving and intending to injure the said Otto Kuhn and destroy his domestic happiness and alienate from him the affections of his wife and deprive him of her comfort, society, and assistance, did falsely state and represent to his said wife that said Otto Kuhn was a blasphemous and an immoral, irreligious, depraved, hypocritical, and godless man and wholly in the power and under the influence of the devil, and that it would be useless for his said wife to try to reclaim him from the bondage of the devil, as he was hopelessly and irretrievably lost; and the said defendant Otto Kuhn further alleged in his said petition that on or about October 1, 1882, and at divers times thereafter, your defendant herein, with the like evil and malicious intent and purpose, did falsely state and represent to the said Otto Kuhn's wife that he had before and at the time of his marriage with the said Rosina Kummer a lawful wife living in Germany, and that the said marriage with the said Rosina Kummer was wholly null and void, and that the said Rosina was not his wife at all, and that it would be sinful and criminal for her to cohabit with him; and that on or about the said 1st day

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of October, 1882, and many times thereafter, your plaintiff herein, wrongfully and maliciously intending to injure him without any just cause, did advise, induce, and persuade and entice the said Rosina Kuhn not to cohabit with him; that his said wife, Rosina Kuhn, believing said statements and representations, and relying on their truth, drove him from her house and refused to longer cohabit with him and had since the 1st day of October, 1882, so refused; that the said Otto Kuhn claimed damages by reason of the aforesaid matters in the sum of \$10,000 from your plaintiff." His was a verdict upon a very doubtful claim, which was liable to be reversed in the supreme court. The attorneys for Mr. Kuhn recognizing the fact, and to prevent a review of the cause, effected a compromise of the claim, and were thereupon paid the amount agreed upon. Afterwards Kuhn comes before the court and claims to be the sole owner of the judgment, and denies the authority of his attorneys to compromise the judgment, and the court evidently acted upon that view of the case. If the allegations of the petition are true, however, he was the owner of but half of the judgment, and his attorneys who effected the compromise and received the amount agreed upon were the owners of the other half. These allegations, if true, were a fraud upon the court and the plaintiff in error, for which she is entitled to relief. The rule is that where a judgment has been procured by artifice or concealment on the part of the plaintiff, a court of equity will grant appropriate relief. (*Tomkins v. Tomkins*, 11 N. J. Eq., 512; *Griffith v. Reynolds*, 4 Gratt. [Va.], 46; *Pratt v. Northam*, 5 Mason [U. S.], 95; *Fish v. Lane*, 2 Hayw. [N. Car.], 522; 1 Black on Judgments, sec. 37.)

In *Spencer v. Vigneaux*, 20 Cal., 442, S. sued V., G. and D., as partners, for \$22,000. V. had paid \$10,000 on this claim, but concealed the fact, and the plaintiff took judgment for the entire amount. Afterwards the partners discovered the true state of the account, and insisted on a

Phillips v. Kuhn.

credit on the judgment for \$10,000, and the court granted an injunction to prevent the enforcement of the original judgment. Indeed, the rule is general that a court of equity will grant relief against a judgment procured by the creditor's fraudulent concealment of facts. (*Cal. Beet Sugar Co. v. Porter*, 68 Cal., 369; *Chambers v. Robbins*, 28 Conn., 552; *Stone v. Lewman*, 28 Ind., 97; *Johnson v. Unversaw*, 30 Id., 435; *Rogers v. Gwinn*, 21 Ia., 58; *Dobson v. Pearce*, 12 N. Y., 165; *Holland v. Trotter*, 22 Gratt. [Va.], 136; 10 Am. & Eng. Ency. of Law, 143.)

A court of equity will grant relief upon the facts stated in the petition. The judgment of the district court is reversed, the demurrer overruled, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

Post, J., concurs.

NORVAL, J., dissenting.

I do not concur in the above opinion of the majority of the court. An attorney who obtains a judgment for his client cannot, in the absence of special authority so to do, receive in satisfaction of the judgment a less amount than is due thereon. Such was the holding of this court in *Hamrick v. Combs*, 14 Neb., 381.

The petition shows that the district court, in which the judgment was rendered, which is sought to be enjoined in this action, on motion of Otto Kuhn, and notice thereof given to Eliza Phillips, set aside and vacated the entry of satisfaction of the judgment, and awarded execution for the sum remaining unpaid. That the court had jurisdiction to hear and determine the matter on motion cannot be doubted (*Wilson v. Stillwell*, 14 O. St., 464; *Laughlin v. Fairbanks*, 8 Mo., 367), and its decision upon the motion is conclusive upon the parties until reversed in a direct proceeding brought for that purpose. If Kuhn's attorneys

were authorized to make the compromise and settlement of the judgment, or if the entry of satisfaction was made with Kuhn's knowledge or consent, or if the attorneys were part owners of the judgment, as is now alleged in the petition, the same should have been urged on the hearing of the motion. It is now too late to do so. The order of the district court vacating the entry of satisfaction, in our view, is *res adjudicata*, as to all matters which were or could have been litigated on the hearing of the motion. It is a bar to this action, and the district court did not err in sustaining the demurrer to the petition. The judgment should be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1892.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
HON. T. L. NORVAL, { JUDGES.
HON. A. M. POST, }

AB. KIRSCHBAUM ET AL. V. W. T. SCOTT ET AL.

[FILED SEPTEMBER 21, 1892.]

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| 35 | 199 |
| 47 | 338 |
| 35 | 199 |
| 58 | 273 |
| 85 | 199 |
| 60 | 728 |

1. **Attorney: UNAUTHORIZED APPEARANCE.** Where an attorney waives process and appears for a defendant, his authority to do so will be presumed; but the defendant may deny and disprove such authority, in which case he will not be bound by the attorney's appearance.
2. ———: ———: **ATTACHMENT.** In the case stated, *held*, that the questions presented, aside from the want of authority of the attorneys to appear, are, first, that the action on which the attachment issued arose upon contract; and, second, that the garnishees acted in good faith in the garnishment proceedings.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Halleck F. Rose, J. S. Bishop, and S. B. Pound, for plaintiffs in error:

Unauthorized appearance by attorneys confers no jurisdiction, and judgment entered in such a case is a nullity. (*Price v. Ward*, 1 Dutch. [25 N. J. L.], 225; *Osborn v. Bank*, 9 Wheat. [U. S.], 829; *Shelton v. Tiffin*, 6 How. [U. S.], 186; *Sherrard v. Nevius*, 2 Carter [Ind.], 241; *Hess v. Cole*, 3 Zab. [23 N. J. L.], 116; *Anderson v. Hawhe*, 115 Ill., 33; *Parker v. Spencer*, 61 Tex., 155; *Critchfield v. Porter*, 3 O., 521; *Frye v. Calhoun County*, 14 Ill., 132; *Harshey v. Blackmarr*, 20 Ia., 161; *Kepley v. Irwin*, 14 Neb., 300; *Eaton v. Hasty*, 6 Id., 419; *McDowell v. Gregory*, 14 Id., 36; *Vorce v. Page*, 28 Id., 294.)

Harwood, Ames & Kelly, and E. A. Gilbert, contra.

MAXWELL, CH. J.

In 1887 the plaintiffs had a claim for \$900, or more against the firm of Hopkins & Cowan. This was sent to L. C. Burr, of Lincoln, for collection. He sent the account to the defendants, and there is some claim on their part that proceedings by attachment to collect the debt were instituted. No issue of that kind is made in the pleadings, but the proof tends to show that such was the case. The matter, however, was afterwards settled by taking the notes of Hopkins & Cowan for the amount claimed, due in thirty days and six months. These notes were paid at maturity; but on paying the second note the defendants were garnished in an action before a justice of the peace, wherein one James H. Hamilton was plaintiff and the plaintiffs herein defendants. The transcript of that judgment is as follows:

“Transcript of proceedings had before J. C. Carnahan, a justice of the peace in and for York township, York, Nebraska, in February of the year 1888, in an action

Kirschbaum v. Scott.

wherein James H. Hamilton was plaintiff and Ab. Kirschbaum, Emil Selig, Morris May, and Simon Kirschbaum, comprising the firm of Ab. Kirschbaum & Co., were defendants.

"February 9, 1888, plaintiff filed his affidavit in attachment against the defendants, on the ground of non-residence, and praying judgment in the sum of. \$71.

"February 9, 1888, summons issued returnable February 14, 1888, at 10 A. M., and delivered to George Shreck, constable.

"February 9, 1888, order of attachment issued returnable February 14, 1888, at 10 A. M., and delivered to G. W. Shreck, constable.

"February 14, 1888, summons returned indorsed as follows, to-wit:

"STATE OF NEBRASKA, } ss.
YORK COUNTY.

"Received this writ on the 10th day of February, 1888, and I hereby certify that I am unable to find the within named defendants in my county.

"G. W. SHRECK.

"Fees, \$1.

Constable.'

"February 14, 1888, order of attachment returned, indorsed as follows, to-wit:"

The justice then copies the returns, showing service upon the garnishees, and their answer. The justice then made the following order:

"It is therefore ordered that they (the garnishees) pay into court the said \$130, to apply on this claim and costs, or so much thereof as will pay this claim and costs.

"March 15, 1888, case called at 10 A. M., and all parties appeared in court. The defendant appeared by Scott & Gilbert, attorneys.

"Plaintiff appeared in person and by Sedgwick & Power, attorneys, and introduced in evidence their bill of particulars, and called as witness F. C. Power, who was sworn and gave evidence in the case.

Kirschbaum v. Scott.

"From the evidence in the case I do find and say that there is due from the defendants Ab. Kirschbaum *et al.* the sum of \$71.50.

"It is therefore considered and adjudged by me, this 15th day of March, 1888, that the plaintiff J. H. Hamilton have and recover of and from the defendant Ab. Kirschbaum & Co. the sum of \$71.50, with interest thereon from the date hereof at the rate of 7 per cent per annum, and the costs of this action herein expended, taxed at \$8.65.

"J. C. CARNAHAN,

"Justice of the Peace.

"March 23, 1888, transcript made and delivered to plaintiffs.

"April 21, 1888, received the above judgment, interest, and costs in full of Scott & Gilbert, garnishees.

"J. C. CARNAHAN."

It will be observed that there is nothing to show that the action is upon contract, or that the case is one in which an attachment against a non-resident would lie. The proof, however, tends to show that the action was brought by Hamilton, as sheriff, for attorney's fees and expenses incurred by him in defending an action in Platte county for the wrongful attachment of the goods of Hopkins and Cowan. It seems that before levying the attachment in question the sheriff had demanded an indemnifying bond, which had been given, and it is claimed that the suit before the justice was upon such bond. Whether it was a legitimate claim or not we are unable from the proof to determine; but as there must be a new trial, that, if put in issue, will be a proper subject of inquiry in the next trial.

The defendants, having been served with process as garnishees, appeared and answered as to amount of money in their hands, and they were ordered to hold \$130 until the further order of the court. The defendants then, as attorneys for the plaintiff, appeared in the case of *Hamilton*

Kirschbaum v. Scott.

v. *Kirschbaum et al.*, although advised by Mr. Burr not to do so, but to let Mr. Hamilton obtain service by publication and in the meantime correspond with the plaintiffs.

It is true Mr. Burr advised the defendants to endeavor to induce Mr. Hamilton to dismiss the case; but the record wholly fails to show any authority from Burr to authorize the defendants to appear for the plaintiffs. There is nothing to show that Burr had such general authority, and it is very clear that he did not attempt to exercise it. The rule is well settled that where an attorney appears for a defendant not served with process, it will be presumed that he had authority to appear; but if the defendant may prove that he had no such power, his rights cannot be affected by the unauthorized appearance. (*Kepley v. Irwin*, 14 Neb., 300; *Denton v. Noyes*, 6 Johns. [N. Y.], 298; *Frye v. Calhoun*, 14 Ill., 132; *Legere v. Richard*, 10 La. Ann., 669; *Handley v. Statelor*, Lit. Select Cases [Ky.], 186; *Hess v. Cole*, 3 Zab., 116 [23 N. J. L.]; *Anderson v. Hawhe*, 115 Ill., 33.)

There was no authority for the defendants to appear in the case, and the final judgment in favor of Hamilton is void. The case, therefore, stands upon the answer in garnishment, and whether the same was made in good faith, and also whether the action was one in which an attachment would lie; these questions, upon proper issues, may be determined in the next trial; but unless justified by the garnishment proceedings in paying the money to the justice, the defendants will be liable for the same. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 35 | 204 |
| 39 | 450 |
| 35 | 204 |
| 48 | 72 |
| 35 | 204 |
| 58 | 401 |

UNION PACIFIC RAILWAY COMPANY V. JOHN PETER MERTES.

[FILED SEPTEMBER 21, 1892.]

1. Dismissal: NON-PAYMENT OF COSTS: RULE UNDER THE CODE.

Under the common law, where an action is dismissed for want of prosecution, at the costs of the plaintiff, the plaintiff is required to pay such costs before prosecuting a second action for the same cause. In equity procedure, however, this rule is not enforced. A court of equity will be governed by the circumstances of each case, and where there is a valid excuse given for the failure to pay the costs in the former suit, will not compel such payment as a condition of permitting the second to proceed. The equity rule prevails under the Code, and while the court will not permit vexatious litigation, it will, in a proper case, excuse the non-payment of costs in the case previously instituted.

2. Motion to Direct Verdict. If a party desires to submit his case to the jury on the evidence of the plaintiff, and asks an instruction that the jury find for the defendant, he should make his motion to that effect without reservation. If he does not, the court may refuse to entertain it.

3. The questions of negligence were properly submitted to the jury.

4. Contributory Negligence. Although a party may have negligently exposed himself to an injury, yet if the defendant, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

J. M. Thurston, W. R. Kelly, E. P. Smith, and Schomp & Corson, for plaintiff in error.

H. B. Holsman, and Mahoney, Minahan & Smyth, contra.

MAXWELL, CH. J.

The plaintiff below in his petition alleges, in substance, that on the 14th day of June, 1885, in Douglas county and state of Nebraska, he was injured by the defendant; that said injury was done by defendant running a locomotive engine against plaintiff, thereby fracturing four ribs and doing him other bodily injury; that on account of said injury the plaintiff is wholly and completely disabled for manual labor; that said disability is permanent; that said injury was done to the plaintiff at a point on the defendant's line of railroad in said county and state where said railroad is crossed and intersected by a public county road, or on said line of road near said crossing; that the said public road passes over the said railroad at the place where the locomotive of defendant struck and injured plaintiff; that the agents and servants of the defendant negligently and carelessly ran a locomotive engine against said plaintiff; that said injury to plaintiff was caused wholly by the negligence and carelessness of the agents and servants of the defendant in charge of said locomotive engine; that plaintiff was not guilty of contributory negligence; that the plaintiff had earned his living by manual labor; that his labor was worth the sum of five hundred and ninety-two dollars annually; that before said injury he was in good health and able to work; that the plaintiff's age at the date of the injury was about forty-nine years; and that he had an expectancy of life of $21\frac{81}{100}$ years; that on account of said injury the plaintiff has suffered much pain, and had to employ a surgeon to treat said injury, which surgical aid cost the sum of four hundred dollars. Wherefore he prayed for damage in the amount of one thousand nine hundred and ninety-nine dollars.

The defendant filed an amended answer, in which it denied that plaintiff was injured in the manner or to the extent alleged in the petition; denied that the plaintiff was

injured at the place alleged in the said petition; denied that plaintiff was injured by being struck by defendant's locomotive engine at a point on its road where it crosses a public road; denied that its agents and servants in charge of said locomotive engine were guilty of carelessness and negligence; denied that its agents negligently and carelessly ran said locomotive engine against said plaintiff; denied that plaintiff was injured in any manner, or to any extent, by reason of any fault or negligence on the part of the defendant, its servants or employes; that if plaintiff was injured as alleged in the petition, or to any extent, it was through his own fault and carelessness contributing thereto, and not through any fault or carelessness attributable to this defendant.

In an action in the United States district court then pending, wherein the plaintiff below was plaintiff and the defendant below was defendant, and wherein the same cause of action set up and recited in plaintiff's petition was then in said court pending for trial, and in which said action the said plaintiff had complained of and against said defendant of and concerning the very same alleged wrong and injury in the petition herein alleged and mentioned, the court made an order as follows:

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| "JOHN PETER MERTES | } | Dismissal. |
| V. | | |
| UNION PACIFIC RY. CO. | | |

"This cause coming on for hearing upon the regular call of the docket, and the plaintiff failing to appear, upon motion of the defendant, by A. J. Poppleton, its attorney, it is ordered by the court that this cause be, and the same is hereby, dismissed, for the want of prosecution, at the cost of plaintiff, and that execution issue therefor."

That afterwards, on the 8th day of October, 1890, the plaintiff below filed a motion in the district court of Douglas county, based on the records of the proceedings in the United States circuit court, by which motion the defend-

ant prayed the court to arrest the action, and asked for judgment of nonsuit against the plaintiff on account of said judgment in the United States circuit court, and because the plaintiff had not paid said costs. Thereupon the plaintiff offered and read in evidence, in resistance of defendant's motion, his affidavit of merits, and admitting therein that he had not paid the costs adjudged against him in the United States circuit court, and averring that he had not paid the same on account of his poverty and inability to earn anything on account of the injury set forth in the petition, and that the only thing of value that he owned was his cause of action against the company for personal injury, and that he could not obey any order requiring him to pay costs in the United States circuit court on account of his poverty."

The motion to dismiss was overruled, and this is the first error complained of.

Under the common law, where an action is dismissed without prejudice at the costs of the plaintiff, he cannot maintain a second action until he has paid the judgment for costs in the first action (*Weston v. Withers*, 2 Term Rep. [Eng.], 511), and the plea of poverty is no excuse (*Id.*). The rule seems to have originated in ejectment cases, which, under the common law, could be brought without limit. In the case cited, however, the action was for unlawful distress of property, and seems to have been attended with circumstances of peculiar hardship, yet the court applied the rule in ejectment cases.

The common law rule has been recognized in many cases in this country. (*Perkins v. Hinman*, 19 Johns., 237; *Jackson v. Edwards*, 1 Cow. [N. Y.], 138; *Jackson v. Carpenter*, 3 Id., 22; *Jackson v. Schaubert*, 4 Wend. [N. Y.], 216; *Kentish v. Tatham*, 6 Hill [N. Y.], 372; *Felt v. Amidon*, 48 Wis., 66.) In *Stebbins v. Grant*, 19 Johns. [N. Y.], 196, the court recognized the common law rule, but refused to apply it in suits in equity. A court of equity will be gov-

erned by the circumstances of each case, and where there is a valid excuse given for the failure to pay the costs incurred in the former action, it will not compel such payment as a condition of permitting the second to proceed.

Under the Code there is no doubt the equity rule prevails; and while the court will not permit vexatious litigation, it will in a proper case excuse the non-payment of costs in the case previously instituted.

The common law procedure was for a rule to show cause, and the order required the payment of costs by a day named, or the cause to be dismissed. It was not by motion to dismiss, as in the case at bar. In any view of the case, therefore, the motion was properly overruled.

Second—It is claimed that the court erred in overruling the motion to instruct against the plaintiff below upon the conclusion of his testimony in chief. It is unnecessary to examine this question, as upon the overruling of the motion the defendant below offered testimony in support of the defense, and thus waived any error, if such there was, in overruling the motion. In addition to this, the motion was not absolute and without reservation, but upon condition.

Third—The testimony tends to show that the accident occurred on Sunday, the 14th day of June, 1885, at or near what was then known as Sheeley's crossing of the Union Pacific railway—now Twenty-sixth street in the city of Omaha; that the defendant resided on the line of said railway at or near said crossing; that in the morning of that day he went into the city and was shaved, and afterwards attended church. He had also taken a dram of whiskey in the morning and two after the service. The proof, however, fails to show that he was in any manner affected by the liquor. He started for home between 12 M. and 12:30, and followed the streets as far as Seventeenth street at the lumber yard, and from there followed the railroad to Sheeley's crossing. At Sheeley's crossing,

and for several blocks east and west of that point, there was at the time of the accident a double track on the railway, the tracks being about nine feet apart. The trains running into Omaha went in on the south track, and those going out, on the north one. It appears to have been customary for persons who lived along the railway to walk on the tracks, and the plaintiff testifies that he got on the south track, walked up that until he heard and saw a Missouri Pacific freight train going into Omaha on that track, when he stepped into the space between the two tracks or roads and walked there until he reached Sheeley's crossing, when in crossing the north track he was struck by an engine.

The plaintiff below testifies that the Missouri Pacific train passed him near Twenty-fourth street, and he was then walking between the tracks, and continued to walk between the tracks until he reached Sheeley's crossing, when he turned to the right and crossed the north track; that he was on the end of a tie and about to step off when the engine struck him; that there is a curve in the railway east of Sheeley's crossing, so that a person cannot see down the track more than twenty or thirty yards; that almost immediately before he was struck the engineer had blown the whistle "toot, toot," but there was not time to step off the tie.

The testimony of the engineer corroborates this testimony in several respects, as he testifies, in effect, that the plaintiff below was not run over, but was struck with the cross-bar of the engine.

The engineer testifies that he was running a light engine without a load to Gilmore for the purpose of taking a train from there to Grand Island; that the tender of the engine had an air-brake upon it which was under the control of the engineer; that he noticed the plaintiff below walking between the tracks until he was just east of Sheeley's crossing, when he stepped upon the track to cross the same.

On cross-examination the engineer testified that he could stop that engine, as it was running, in from thirty to forty-five feet. The efforts he made to stop the engine are stated by himself as follows :

Q. Did you reverse the engine or attempt to reverse it when you saw this man on the track?

A. It was not necessary.

Q. The question I asked you is, did you do it, not whether it was necessary or not?

A. When I saw him on the track I reversed the engine.

BY THE COURT: Answer the question just as it is asked, and not wait for the court to tell you again.

BY MR. SMYTH: When you first saw this man did you reverse the engine?

A. I did not.

Q. Did you attempt to reverse it?

A. I did not shut the steam off. I put the air-brake on and shut off the steam and went slower and slower.

Q. Did you put on the air-brake the moment you saw him?

A. When I saw him on the track?

Q. When you saw him first you put on the air-brake?

A. I went slower; yes, sir.

Q. State whether or not you applied the brakes when you saw this man first.

A. Yes, sir.

Q. Instantly, upon seeing him you applied the brakes?

A. I went slower.

Q. Did you apply the brakes?

A. Yes, sir; what brake I had.

Q. Did you shut off the steam when you saw him first?

A. Yes, sir.

Q. You shut it all off just the moment you saw him; is that correct?

A. Yes, sir; I think so, anyway.

Q. You attempted to do it?

A. I did do it.

From which it appears that he did not attempt to stop the engine, but simply slow up.

The engineer and some other witnesses testify that the accident occurred just east of the Sheeley crossing, on the private grounds of the railway near a telegraph pole, and that the plaintiff being improperly on the track the company is not liable.

Upon the question as to the place where the accident occurred there is a direct conflict in the testimony. A number of witnesses testify that it occurred on the crossing, and that the telegraph pole has been moved since the accident. The question, therefore, was proper for a jury to consider.

But suppose the accident did not occur on the crossing, but the engineer, after seeing the imminent danger to the party on the track, could, by the exercise of ordinary care, have stopped his engine and prevented the accident, but did not, the company would without doubt be liable.

The rule is, that although the plaintiff has negligently exposed himself to an injury, yet if the defendant, after discovering the exposed condition, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. (2 Thompson on Negligence, 1157; *Barker v. Sarage*, 45 N. Y., 191, 194; *Brown v. Lynn*, 31 Pa. St., 510; *Northern, etc., R. Co. v. Price*, 29 Md., 420; *Locke v. First Division, etc., R. Co.*, 15 Minn., 350; *Nelson v. Atlantic, etc., R. Co.*, 68 Mo., 593; *O'Keefe v. Chicago, etc., R. Co.*, 32 Ia., 467; *Morris v. Chicago, etc., R. Co.*, 45 Id., 29.)

The rule is very clearly stated by Judge Thompson in his valuable work on Negligence, pp. 1105-1157. In *McKean v. B., C. R. & N. Ry. Co.*, 55 Ia., 192, it is said the rule is required by humanity and reason, citing *Morris v. C., B. & Q. R. Co.*, 45 Ia., 29. To the same effect,

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Brown v. H. & St. J. R. Co., 50 Mo., 461; *Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *Burnett v. B. & M. R. Co.*, 16 Id., 332; *Cook v. Pickrel*, 20 Id., 433; *U. P. R. Co. v. Sue*, 25 Id., 772.

Even if it be conceded that the plaintiff below was unlawfully on the track, and did not look for an engine before crossing the same, still there is testimony in the record from which the jury would be warranted in finding that after the engineer became aware of the perilous condition of the plaintiff below he could, by the exercise of ordinary care, have stopped the engine. This was proper to submit to the jury.

After the testimony of the plaintiff below had been introduced the court permitted the jury, under proper instructions, to visit the scene of the accident in a body, so that they might be better able to apply the testimony.

The verdict was for \$1,000. The injuries are shown to have been very severe, and the verdict certainly is not excessive. All questions seem to have been fairly submitted to the jury, and no error is apparent in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

FRANCIS WILKINS V. ERNEST F. WILKINS.

[FILED SEPTEMBER 21, 1892.]

1. **Insanity: VALIDITY OF CONTRACT BETWEEN FATHER AND SON.** One F. W., father of E. F. W., assisted in paying and securing certain debts of his son, and received a bill of sale from the son of certain personal property which he took possession of. The proof clearly established the fact that the son, a year or more before the execution of the bill of sale, had been injured and his mind affected so as to incapacitate him to transact busi-

Wilkins v. Wilkins.

ness, and that his father had knowledge of these facts. In an action of replevin by the son to recover the property, the contract, not being for necessities, was *held* void.

2. Subrogation. It is probable that in a proper proceeding the father may be subrogated to the rights of creditors of his son, whose debts he apparently in good faith paid, or secured, in whole or in part.

ERROR to the district court for York county. Tried below before NORVAL, J.

Sedgwick & Power, for plaintiff in error.

E. A. Gilbert, *contra*.

MAXWELL, CH. J.

This is an action of replevin brought by the defendant in error against the plaintiff in error to recover the possession of certain personal property. On the trial of the cause the jury disagreed, whereupon, by stipulation, the cause was submitted to the court upon the evidence, and judgment was rendered in favor of plaintiff below.

The plaintiff in error is the father of the defendant in error. In January, 1887, the son executed to his father a bill of sale as follows:

"Know all men by these presents, that I, E. F. Wilkins, of York county, Nebraska, for and in consideration of the sum of \$1,000, do hereby sell and transfer unto Francis Wilkins, of York county, Nebraska, the following described property, to-wit: One pair of mules; one pair of mares, one black and one gray, seven years old; one brown horse, twelve years old; one iron-gray colt, coming three years old; three cows; one heifer; one calf; one Deering self-binder; one Deering mower; sulky hay-rake; one sulky stirring plow; two corn plows; one Moline wagon; one harrow; 1,000 bushels of corn. And I warrant the title thereto against all persons whomsoever.

"E. F. WILKINS.

"C. W. FAILING."

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The father took possession of a portion of the above property and the son afterwards instituted this action and regained the property taken. The defense was and is, that the son was *non compos mentis*, and hence that he was incapable of making a contract.

The testimony tends to show that some two years before the execution of the contract the son had been injured by a severe fall that had affected his brain, and that since that time he had to a great extent been incapacitated to transact business. So far as we can judge, the father was anxious to aid his son to pay and secure certain debts and obligations and aided him in doing so, but well knowing at the time his condition. The bill of sale, however, was not given to secure a debt for necessities and is not binding on the son. It is probable that in a proper proceeding the father may be subrogated to the rights of creditors of his son whose claims were satisfied, or secured, in whole or in part; but under the pleadings he cannot have that relief in this action. The judgment is

AFFIRMED.

POST, J., concurs.

NORVAL, J., took no part in the decision.

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STAR UNION LUMBER COMPANY, APPELLANT, v. A. M.
FINNEY ET AL., APPELLEES, IMPEADED WITH
D. C. BRYANT, APPELLANT.

[FILED SEPTEMBER 21, 1892.]

1. **Mechanic's Lien: PROCEDURE TO ENFORCE: APPEAL.** An action was instituted to foreclose a mechanic's lien and have certain policies of insurance taken in the name of the land-owner assigned to the plaintiff. *Held*, That the action being instituted

Star Union Lumber Co. v. Flunney.

as one in equity, the procedure in equity in regard to appeals to the supreme court applies, even if some of the proceedings were in the nature of an action at law.

2. The testimony and conduct of the parties clearly established the making and delivery of the policies of insurance.
3. **Fire Insurance: INSURABLE INTEREST: PROOF OF LOSS.** An adjuster filled out the proof of loss and stated therein that the insured was the owner in fee-simple, when in fact he claimed under a contract. This he handed to the insured and requested him to go before a notary public and make oath to the same. The proof was not read to the insured, and he testified that he did not read the same but supposed that it had been filled out properly. *Held*, That the evidence showed the insured had an insurable interest in the property, and that the proof of loss would have been equally available had the insured stated the actual facts as to his ownership, and that the company was not prejudiced by the misstatement.
4. **Assignment of Claim.** After a loss has occurred the insured may assign the right to recover for same without the consent of the insurance company, and the assignee may recover in his own name.
5. **Condition in Policy Waived.** The provision in a policy of insurance, that the company shall have sixty days in which to pay the loss, is personal, and may be waived by it. It is merely a provision that during the time stated it shall not be liable for costs.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Irvine & Clapp, for Star Union Lumber Company, appellant:

Refusal of insurance companies to pay, and their denial of liability on the policies, estop them from claiming benefit of provision in policy allowing sixty days for payment of loss. (*Allegre v. Md. Ins. Co.*, 6 H. & J. [Md.], 337; *Hoffecker Bros. v. Ins. Co.*, 5 Houst. [Del.], 101; *Williamsburg Ins. Co. v. Cary*, 83 Ill., 453; *State Ins. Co. v. Maackens*, 38 N. J. L., 564.) Contract of insurance is complete on acceptance of risk by company and before

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issuing policy. (*Home Ins. Co. v. Curtis*, 32 Mich., 402; *Lungstrass v. German Fire Ins. Co.*, 48 Mo., 201; *Krumm v. Jefferson Ins. Co.*, 40 O. St., 225; *Neb. & Ia. Ins. Co. v. Seivers*, 27 Neb., 541; *Baldwin v. Choteau Ins. Co.*, 56 Mo., 151.) Where insured has insurable interest covenants and warranties as to title appearing in policy cannot be set up by insurer to defeat policy when no representation as to title was previously made. (*Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass., 136; *Castner v. Farmers' Mut. Ins. Co.*, 46 Mich., 15; *Hoffecker v. Ins. Co.*, 5 Houst. [Del.], 101; *Tiefenthal v. Citizens Mut. Co.*, 53 Mich., 306; *Western Assurance Co. v. Mason*, 5 Bradw. [Ill.], 141; *Phila. Tool Co. v. Assurance Co.*, 132 Pa. St., 236; *American Basket Co. v. Farmville Ins. Co.*, 3 Hughes [U. S.], 251; *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis., 89.) A misstatement as to title in proof of loss is not material unless made fraudulently. (*Lamb v. Council Bluffs Ins. Co.*, 70 Ia., 238; *Helbing v. Svea Ins. Co.*, 54 Cal., 156; *Little v. Phoenix Ins. Co.*, 123 Mass., 380.)

Fawcett & Sturdevant, for D. C. Bryant, appellant.

A. S. Churchill, for appellees.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county to foreclose a mechanic's lien on lots 1 and 2, block 34, of Albright's Choice, an addition to South Omaha. The amount claimed to be due and unpaid is the sum of \$1,192.50.

It is alleged in the petition, in substance, that William G. Albright was seized in fee of the lots above described; that early in the year 1888 he sold the same and gave a contract of purchase, which after various assignments was transferred to A. M. Finney; that in April, 1888, the defendant Coy, being a contractor and builder, entered into a

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contract with the defendant Finney to construct eleven houses, according to certain plans and specifications, for the agreed price of \$585 for each house; that Coy thereupon purchased from the plaintiff large quantities of lumber and other material for the erection of said houses, which lumber and material was of the value of \$1,192.50, and was used by said contractor in the erection of five of said houses; that within sixty days, to-wit, on June 28, 1888, the plaintiff filed the necessary statement in the office of register of deeds of said county to obtain a mechanic's lien upon said property for the amount so due; that during the construction of said houses Finney agreed with the defendant Coy that he would insure said houses and keep the same insured for the benefit of Coy and the plaintiff, and in pursuance of said agreement he did insure each of said houses in the sum of \$500 against loss or damage by fire; that three of said houses were insured in the New Hampshire Insurance Company and two of said houses by the Dwelling House Insurance Company. The numbers of the several policies are set out in the petition.

It is also alleged that while the insurance was taken for the benefit of Coy and the plaintiff, that the defendant Finney wrongfully and fraudulently caused said policies to be written in his own favor; that on the 26th of May, 1888, four of said houses were destroyed by fire; that due notice of said loss was given to said companies, and there is now due from the Dwelling House Insurance Company the sum of \$53.62 and from the New Hampshire Insurance Company the sum of \$1,059.63; that since said losses occurred the defendant Finney has agreed to assign said policy to the plaintiff to apply on said debt, but has refused to make said assignment in writing.

Albright answered the petition, setting out the amount due on the contract, and alleging a willingness to convey upon receiving the amount due.

In November, 1888, a supplemental petition was filed

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by the plaintiff, wherein it is alleged that on the 2d day of July, 1888, Finney duly transferred all his interest in said policies to the plaintiff. A few days thereafter D. C. Bryant, who had been permitted to intervene, filed an answer, wherein he claims that on the 6th day of June, 1888, A. M. Finney assigned to him a policy of insurance upon one of said houses to secure the sum of \$353.20, and upon which he prays judgment.

The Dwelling House Insurance Company, in its amended answer to the petition and supplemental petition, alleges "that Finney was not the owner of said lots in fee-simple, and that it was not aware of the fact until the bringing of this action; that each of said policies contain, among other conditions, agreement, and warranties, the following, to-wit: 'If the interest of the assured in said property, or any part thereof, now is or shall become any other or less than a perfect, legal, and equitable title and ownership free from all liens whatever, except as stated in writing hereon, or if the buildings, or either of them, stand on leased ground or land of which the assured has not a perfect title, or if this policy shall be assigned without written consent hereon, then, and in every such case, this policy shall be absolutely void.' That the houses did not stand upon ground or land of which the said A. M. Finney had a perfect title, either at the time of the issuance of the policy or at the time of loss, nor was there any written statement upon either of said policies that the interest of the assured was other or less than a perfect, legal, and equitable title and ownership free from all liens whatever; that said property was not then, is not now, nor has it been free of all liens since the date of said policies; that the liens and incumbrances exceeded the whole value of the property, and this defendant under said policy is not liable by reason thereof.

"This defendant further says the policies were never delivered, nor was the premium ever paid, nor was any time

given in which to pay the premium, nor was any note given therefor; that the policies were purloined from the office of the agent of this company without his knowledge or consent; that said policies would not have been delivered if applied for until the premium was first paid; that the said A. M. Finney in his proofs of loss stated under oath 'that he was the owner in fee-simple of said lots.'"

Then follows a provision of the policy that the insured shall forthwith give a written notice of the loss, etc., and "that any misrepresentation in the proofs or examination as to the loss or damage shall forfeit all claims under this policy," and that "no act or omission of the company, or any act of its officers or agents, shall be deemed, construed, or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, nor is extension of time to the assured for compliance, except it be a waiver or extension in express terms and in writing signed by the president or secretary of the company." There is also a denial that there has been any adjustment of the loss or any waiver of the conditions of the policy.

The substituted answer of the New Hampshire Fire Insurance Company is substantially the same as the above, but the facts are set out more in detail.

The plaintiff and Bryant each filed a reply to these answers which need not be noticed.

On the trial of the cause a decree was rendered in favor of Albright and against Finney for the sum of \$680.72, which was declared a first lien upon the said premises; that there is due from the defendant Coy to the plaintiff the sum of \$1,359.45, for material furnished by the plaintiff to said Coy for the erection of dwelling houses upon said premises as alleged in the petition. The court also finds that the necessary steps were taken by the plaintiff to obtain a mechanic's lien and that the same is a valid lien for the amount above specified, subject only to the lien of Al-

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bright; as between the plaintiff and the insurance companies and Bryant and the insurance company the court found for the companies and dismissed the action. The case is brought into this court by appeal.

The contest in this case is wholly between the insurance companies and the plaintiff and Bryant.

The first objection made on behalf of the insurance companies is that the action is one at law, and, therefore, cannot be brought into this court by appeal.

It is a sufficient answer to this objection to say that the action was instituted as one in equity; that the relief sought was equitable in its nature and it was tried as an action in equity. This objection, therefore, would be of no avail, even if the final recovery had been of a purely legal nature. There is nothing, therefore, in the first objection.

Second—The testimony tends to show that A. M. Finney had a contract of purchase for the lots in question; that a portion of the purchase money had been paid for the same; that about April 10, 1888, Finney entered into a contract with Coy to erect five houses on the lots at the agreed price of \$585 each; that Coy thereupon proceeded to erect the buildings and procured a large part of the material therefor from the plaintiff; that about the time the buildings were completed, Finney insured the same for the sum of \$500 each, in the companies named, three of the risks being taken by the New Hampshire Company and two by the Dwelling House Company. The testimony also tends to show that the same agent represented both of the defendant companies, that this agent employed as solicitor E. E. Finney, a brother of A. M. Finney, and that the applications in this case were made by such solicitor. The policies were filled out, and it is claimed on behalf of the companies that they were not delivered. This claim, however, is clearly disproved by the conduct of the parties. It appears that the agent, after the loss, paid the amount of the premiums himself and was credited with the amount on the

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books of the company. This he says was a month or two after the loss occurred. The exact date, however, is not material, neither is the state of the account between E. E. Finney and the agent anywhere set out. The premiums were paid, and if the money was advanced by the agent, it is an admission that the policies were lawfully issued. A few weeks after the loss occurred the adjuster of the New Hampshire Company, together with the agent at Omaha and A. M. Finney, visited the place where the fire occurred, and the adjuster of the New Hampshire Company made the following:

| | |
|---|----------|
| “ Estimated cost of rebuilding, by H. B. Jeffers, | |
| contractor..... | \$325 00 |
| “ Damage to foundation..... | 28 21 |
| | <hr/> |
| | \$353 21 |

“ OMAHA, June 15, 1888.

“ Assured’s contractor had put \$431.81 into this house, but we found we could construct it for less money.

“ FRED W. LEE, *Adj.*

“ Agency, Omaha, Neb. Assured, A. M. Finney. Date of fire, May 19, 1888. Proof made June 15, 1888. Policy No. 306426. Amount of policy, \$650. Amount awarded, \$353.21. Adjusted by Fred W. Lee.”

| | |
|---|----------|
| “ Estimated cost of rebuilding, by H. B. Jeffers, | |
| contractor..... | \$325 00 |
| “ Damage to foundation..... | 28 21 |
| | <hr/> |
| | \$353 21 |

“ OMAHA, June 15, 1888.

“ Assured’s contractor had put \$413.81 into the house, but we found we could construct it for less money.

“ FRED W. LEE, *Adj.*

“ Agency, Omaha, Neb. Assured, A. M. Finney. Date of fire, May 19, 1888. Proof made June 15, 1888.

 Star Union Lumber Co. v. Finney.

Policy No. 306425. Amount of policy, \$650. Amount awarded, \$353.21. Adjusted by Fred W. Lee."

| | |
|--|----------|
| "Estimated cost of rebuilding, by H. B. Jeffers, contractor..... | \$325 00 |
| "Damage to foundation..... | 28 21 |
| | <hr/> |
| | \$353 21 |

"OMAHA, June 15, 1888.

"Assured's contractor had put \$431.81 into this house, but we found we could construct it for less money.

"FRED W. LEE, *Adj.*

"Agency, Omaha, Neb. Assured, A. M. Finney. Date of fire, May 19, 1888. Proof made June 15, 1888. Policy No. 306427. Amount of policy, \$650. Amount awarded, \$353.21. Adjusted by Fred W. Lee."

The proof of loss was filled out by Mr. Lee, who, in describing the title of A. M. Finney, said:

"The property insured belonged exclusively to A. M. Finney, and no other person or persons had any interest therein.

"If the loss is on building, state whether real estate is owned in fee-simple or held on lease. Fee-simple.

"State the nature and amount of incumbrance at time of the fire. One hundred and twenty-five dollars, proportionate share of purchase money on lots."

Mr. Finney testifies that Lee told him to take the proof of loss and go before a notary public and make oath to it; that he saw the amount of loss claimed was right and he did not read the instrument.

A great deal of stress is laid by the companies upon the character of title which Finney in his proof of loss stated that he possessed, viz., a fee-simple.

It is difficult to perceive the force of the objection. Finney had an insurable interest in the property, and, so far as appears, the right of payment would have been the same had he claimed under the contract instead of an absolute

title. The companies have failed to point out in what manner they have been prejudiced by this misstatement, which to some extent was the fault of their own adjuster.

It is claimed that a policy could not be assigned without the assent of the company. However this may be as to a policy before a loss occurs, the objection does not apply as to the assignment of a claim for a loss after it occurs. It is also claimed that the action is premature, having been brought before the expiration of sixty days after the loss occurred. This is a provision in favor of the company that may be waived, and will be unless insisted upon, and in no case could extend beyond taxing the costs to plaintiff; in other words, the company has sixty days in which to pay the loss, and it cannot be subjected to costs of an action during that time.

Upon the whole case it is apparent that the equities of the case are with the plaintiff and Bryant, and that the court erred in dismissing the action as to the insurance companies. The judgment of the district court is therefore reversed and judgment will be entered in this court in favor of the plaintiff and D. C. Bryant upon the coming in of the report of the referee, to be hereafter appointed. The cause is referred to _____ to ascertain the amount due on the policies, and the amount due to the plaintiff and D. C. Bryant respectively, and report the same with all convenient speed to this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

PATRICK H. MALLOY V. ANNIE MALLOY.

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|----|-----|
| 33 | 224 |
| 57 | 640 |

[FILED SEPTEMBER 21, 1892.]

1. **Ejectment: CONTRACT TO RECONVEY.** In January, 1884, one E. D. M. leased eighty acres of school land from the state and in February of the same year entered into a contract with one C. P. to surrender his lease to him, and he, C. P., was to advance the first payment and purchase the land from the state, taking the contract in his own name, and E. D. M., upon the repayment of the money advanced and interest thereon, was to receive an assignment of the contract. In July, 1885, E. D. M. died intestate and without issue. C. P. filed his claim against the estate for the money loaned, interest, and taxes paid and afterwards withdrew the same and assigned the contract to the plaintiff, the father of E. D. M. Neither E. D. M. nor his wife, the defendant, had paid any part of the money loaned and paid out by C. P. *Held*, That, stripped of all questions of descent which do not control, the plaintiff stands in the shoes of C. P. and the defendant must perform the contract of E. D. M., and the plaintiff is entitled to a decree of foreclosure and sale for the amount due.
2. ———. A mortgagee cannot maintain ejectment to recover possession of real estate.
3. ———. The plaintiff must possess a legal estate to maintain ejectment.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

M. B. Reese, J. R. Gilkeson, and Geo. I. Wright, for plaintiff in error.

S. H. Sornborger, contra.

MAXWELL, CH. J.

This action was brought in the district court of Saunders county by the plaintiff against the defendant to recover the possession of the east half of the southwest quarter of section 36, in township 17, range 6, in said county.

Malloy v. Malloy.

The petition alleges, in substance, that about January 1, 1884, one Edward D. Malloy, a son of the plaintiff and husband of the defendant, leased the land above described from the state; that in February, 1884, he assigned said lease to one Charles Perky by virtue of an agreement with Perky that he should purchase the land from the state and pay the money due on the contract and give said Malloy the privilege of purchasing the land in two or three weeks by repaying Perky the amount due on said purchase; that in pursuance of said agreement Perky purchased said land from the state and took the contract of purchase in his own name; that E. D. Malloy wholly failed to pay said Perky the amount due on said contract; that in March, 1886, Perky assigned said contract to the plaintiff; that on July 5, 1885, Edward D. Malloy died intestate, leaving no heirs except his widow, the defendant, and his father, the plaintiff herein, and the defendant claims that such widow is entitled to the estate during her natural life.

For second cause of action the plaintiff claims \$600 for rents and profits.

Various defenses were set up by the defendant, and it is admitted by her that Perky paid on said purchase the sum of \$67.40. There is no claim that E. D. Malloy or the defendant has been repaid any of the money paid upon the contract in question. The prayer of the defendant is:

“Wherefore the defendant prays the judgment of the court that the plaintiff go hence without day. And the defendant further prays the court to find the amount, if any, of the principal sum of the purchase price under said contract of purchase, which has been paid by the plaintiff, and what amount of the interest thereon he has paid; also what amount of the principal is now or is to become due, and is not paid to the state, and what amount of interest on the same is now due and to become due, and is unpaid; and that the court may decree that the plaintiff pay the principal sums provided for in said contract when the

same become due, and that the defendant may reimburse plaintiff for any sums paid to the said Charles Perky or the state on account of interest on said contract of purchase, and be required to pay the interest now due the state, and pay the future accruing interest as the same becomes due from time to time, and for such other, further, or different relief between the parties hereto as may seem to the court to be meet, just, and equitable."

The case was tried as an action of ejectment, and a jury called which found for the defendant, and the action was dismissed.

The testimony clearly shows that the plaintiff in error merely possesses an equitable estate in the land. The facts are substantially as follows: Perky advanced the first payment on the land, and some additional money for unpaid rent, in all \$67.40. On February 12, 1884, Perky wrote a card to Edward saying, "The amount due on your school land is \$67.40," and that was the last communication with reference to said land between Perky and Edward. Edward died in July, 1885, without issue. A few days after Edward's death, Perky offered through one Murphy to assign the contract to the defendant if she would pay him the \$67.40, with interest thereon. On November 21, 1885, Perky, at the request of the county judge, filed a claim for \$79.75 against Edward's estate, which was based on the purchase money paid on said contract, on condition that if the claim was paid by December 1 he would assign the contract. On November 25, 1885, a hearing on claims against said estate was had, and the defendant's attorney objecting to its allowance, said claim, with other unallowed ones, was continued to March 4, 1886. On December 5, 1885, Patrick Malloy, the plaintiff, paid \$31.95 on the aforesaid contract of sale, and on March 4, 1886, Perky assigned said contract to Patrick, and withdrew his claim from the files of the county court. The administrators of Edward's estate inventoried said land as belonging thereto,

and the county court, on February 23, 1886, made an order assigning the real estate, not describing it, of E. D. Malloy, situate in said county, to the defendant for life, and remainder to the plaintiff. Said land is in cultivation, and was at the time of the commencement of this suit.

Stripped of all questions as to rights of heirship, which are not the controlling questions in this case, and the plaintiff is possessed of the rights of Charles Perky in the premises, and the defendant of the rights of Edward D. Malloy. It is very clear that Perky held the contract as security for the payment of the moneys advanced by him, and that the plaintiff, by taking an assignment of the contract, stands in his shoes; but neither Edward D. Malloy nor the defendant ever paid anything on the contract. These facts are substantially conceded. It was the duty of the court, therefore, upon the issues and proof to have found the amount due the plaintiff upon the contract in question, and required its payment by a day to be named, failing in which the interest of the defendant should be sold under a decree of foreclosure. Originally the action of ejectment was devised to enable a tenant for years to recover the possession of the devised premises during the term. At common law, to maintain the action, it was necessary for the plaintiff in case of contest to establish four points, viz.: First, title in his lessor; second, a lease for the present term; third, that the lessee entered in possession of said lease, and, fourth, that the defendant ousted or ejected him. (3 Blacks. Com., 202; *Dale v. Hunneman*, 12 Neb., 223.)

Afterwards the action was so modified as to present but two questions, viz., title and the right of possession, and that rule prevails under the Code. To entitle the plaintiff to recover he must possess a legal estate in the premises and be entitled to the immediate possession. (*Dale v. Hunneman*, 12 Neb., 221; *O'Brien v. Gaslin*, 20 Id., 347.)

A lease for years will confer upon the lessee a legal estate and he may recover possession where his lessor but for

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the lease could do so. A party who holds under a contract for the purchase is not in law deemed possessed of a legal estate in the premises, and unless expressly authorized by statute to do so, cannot maintain ejectment. The statement of facts in the petition clearly shows that the plaintiff's title is equitable. It is true he alleges that he has a legal estate in the premises, but the facts stated show that this is untrue. In addition to this, the assignment by Edward D. Malloy and the entry of the land by Perky are but parts of one transaction, the whole being a loan of money upon the land, and in this state a mortgagee cannot maintain ejectment to recover the possession of real estate. (*Kyger v. Ryley*, 2 Neb., 20.)

It is evident, however, that the plaintiff and defendant have rights in the premises which only a court of equity can adjust. The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JONATHAN C. KINGSLEY ET AL. V. E. A. BUTTERFIELD.

[FILED SEPTEMBER 21, 1892.]

1. **Breach of Contract: DAMAGES: PLEADING.** Damages which necessarily result from the injury complained of may be recovered without any special statement of the same, and a motion to make the petition more "definite and certain," by stating in what manner the plaintiff has been damaged by the matters complained of, and the nature and character of such damages, was properly overruled.
2. **Contract: FAILURE TO PERFORM.** No exceptions were taken to the instructions nor any ruling of the court on the trial, and it

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being admitted that the defendants below had failed to comply with their contract to lay out and open a public road, the building of a railway on the proposed route will not relieve them from the payment of damages for the failure to perform.

ERROR to the district court for York county. Tried below before NORVAL, J.

Sedgwick & Power, for plaintiffs in error.

George B. France, contra.

MAXWELL, CH. J.

This is an action upon a contract as follows: "This agreement, made and entered into this 10th day of December, 1886, by and between E. A. Butterfield, of York county, Nebraska, and Jonathan C. Kingsley, C. J. Nobes, Cyrus Hutchins, George Hopkins, and C. M. Cowan, of York county, Nebraska, witnesseth:

"That the said E. A. Butterfield, party of the first part, for and in consideration of the covenants and agreements of the said Jonathan C. Kingsley, C. J. Nobes, Cyrus Hutchins, George Hopkins, and C. M. Cowan, party of the second part, agrees to sell and convey to him, the said Jonathan C. Kingsley, the southeast quarter of section No. 1, in township No. 10 north, of range No. 3 west, in York county, Nebraska; and the said party of the second part, for and in consideration of the agreements of said first party, as hereinbefore stated, agrees to open and maintain a public road commencing on a point on the public road running east and west along the south side of said land not more than twenty rods west from the southeast corner of said land, running thence due north to the county road, running east and west through the center of section No. 1, in township No. 10 north, of range 3 west, in York county, Nebraska; said road to be opened and in condition for use within one year from the date of these presents. For the faithful performance of all which the said parties

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hereto bind themselves in the penal sum of \$250, to be paid as damages for the non-fulfillment of this contract."

It is alleged in the petition "That said defendants, and each of them, have neglected and refused, and still do neglect and refuse, to open and maintain a public road commencing on a point on the public road running east and west along the south side of said land not more than twenty rods west from the southeast corner of said land, running thence due north to the county road, running east and west through the center of section 1, township 10 north, of range 3 west, in York county, Nebraska; and said defendants have neglected and refused, and still neglect and refuse, to open and maintain any road whatever on said piece of land at the place and in the manner that said agreement requires the said defendants to do, to plaintiff's damage in the sum of \$250, and plaintiff has been damaged by reason of the premises, and by reason of defendants' neglecting to perform their part of the said agreement, in the sum of \$250."

A motion was thereupon filed by the defendants below to require the plaintiff below to make his petition "more definite and certain, by stating in what manner the plaintiff was damaged and the character of such damages." This motion was overruled and that is the first error complained of. The court did not err in overruling the motion. The general rule as to pleading damages is as follows: "Such damages as may be presumed necessary to result from the breach of contract need not be stated with any great particularity in the declaration. But in other cases it is necessary to state the damages resulting from the breach of contract specifically and circumstantially in order to apprise the defendant of the facts intended to be proved." (1 Chitty Pl., 371.) Damages which necessarily result from the injury complained of may be recovered without a special statement of the same. (*Bristol v. Gridley*, 28 Conn., 201; *Vanderslice v. Newton*, 4 N. Y., 130; *Swan's Pr. & Prec.*, 229; *Maxw.*, Code Pl., 79.)

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Second—No exceptions were taken to the instructions and no attempt is made to point out any specific error in the rulings of the court. It is admitted that the plaintiffs in error (defendants below) failed to perform their contract, but we are asked to hold that the location of a line of railway on the proposed route prevented them and hence relieved them from liability. We cannot so hold. The plaintiffs in error no doubt were compensated for the right of way taken for the railroad, and whether so or not the contract they had entered into, and for which they had received a consideration, was not performed and the jury found the damages to be the sum stated in the contract with interest. This verdict is supported by the evidence and the judgment is

AFFIRMED.

POST, J., concurs.

NORVAL, J., did not sit.

WAYNE COUNTY V. L. C. COBB ET AL.

[FILED SEPTEMBER 21, 1892.]

County Boundaries. The boundaries of an organized county cannot be lawfully changed, so as to add to such county adjoining unorganized territory, unless a majority of the inhabitants of such territory so petition the county board of the county to which it is proposed to be added, nor unless the proposition has received the sanction of a majority of the voters of such county at an election duly called and held therein for that purpose.

ORIGINAL action.

James Britton, W. M. Wright, and Brome, Andrews & Sheean, for plaintiff.

J. M. Curry, and Leese & Stewart, contra.

NORVAL, J.

This action was brought by Wayne county against L. C. Cobb, M. C. Wheeler, and J. S. Lemmon, members of the board of county commissioners of Thurston county, and C. C. Maryott, the county treasurer of said county, praying that the defendants, and each of them, be perpetually enjoined from exercising any official functions or powers with respect to certain territory, described in the petition, which plaintiff claims to be within the boundaries of Wayne county, and from collecting revenue from said territory and the property and inhabitants thereof, and that said territory be adjudged to be a part of the county of Wayne and not a portion of Thurston county.

After issues were formed the cause was referred, by consent of the parties, to Eugene Moore, Esq., to take the testimony and report the same with his findings of fact thereon. Subsequently the referee made the following findings:

“First—I find that the territory described in the petition of the plaintiff, alleged to be a part of Wayne county, Nebraska, was, April 17, 1854, set apart as a part of the Omaha Indian reservation, by treaty with the United States government, and that at the date at which the plaintiff claims that said territory became a part of Wayne county, the said territory was a part of the Omaha and Winnebago Indian reservation.

“Second—I find that at the time said territory is alleged to have been attached to and became a part of the plaintiff, Wayne county, it was occupied by the Omaha and Winnebago Indians in common as their reservation.

“Third—I find that, in the years 1880 and 1881, there were about 2,500 Omaha and Winnebago Indians and about twenty-five white persons, government employes, living upon and inhabiting said Omaha and Winnebago reservation, and that a few white persons, who were herdsmen, lived upon and occupied for a time, during the years

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mentioned, that portion of the said reservation described in the plaintiff's petition, and that said parties had no rights of residence on said territory than that they acquired by reason of being in charge of private herds of cattle.

"Fourth—I find that a majority of the inhabitants of Wayne county signed a petition asking the legislature to attach that part of the reservation described in the plaintiff's petition to Wayne county.

"Fifth—I find that no petition from the legal voters of Wayne county has ever been presented to the county commissioners of said county, nor has there ever been any election held or vote taken in said county to attach said territory in dispute to said Wayne county.

"Sixth—I find that, from 1881 to 1889, Wayne county has assumed jurisdiction over the territory described in the plaintiff's petition, and levied and collected the taxes and built bridges and improved the public roads within said territory.

"Seventh—I find that, since the organization of Thurston county, said Thurston county has exercised exclusive jurisdiction over the territory in dispute and has levied and collected the taxes, improved the roads, and built and repaired the bridges.

"Eighth—I find that Pender, the county seat of Thurston county, has a population of about 800 people; that it has a number of store buildings, churches, and business blocks, ranging in value from \$1,000 to \$15,000 each.

"Ninth—I find that the bonded indebtedness of Thurston county, of all sorts, is about four thousand dollars, and that the floating indebtedness of said county is about six or seven thousand dollars.

"Tenth—I find that Thurston county, as now existing, contains four hundred and sixteen square miles and no more, and that a severance of the land in dispute from said county will leave Thurston county but three hundred and sixty square miles.

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“Eleventh—I find that the Indians now living in what is now known as Thurston county have had their lands allotted to them in severalty and have severed their tribal relations and are now living thereon and claiming to be citizens of the state of Nebraska, having all the qualifications of citizens under and by virtue of the act of congress of 1887, known as the Dawes Bill, and have been living thereon and claiming to be such citizens ever since July 1, 1887.

“Twelfth—I find that the inhabitants and voters of Wayne county did not consent that the territory in dispute should be stricken from said Wayne county at any time or in any manner.

“Thirteenth—I find that the people and taxpayers living upon the disputed territory described in plaintiff’s petition prefer that said territory shall be and remain a part of Thurston county.

“Fourteenth—I find that the county of Wayne is, and for twenty years last past has been, a county duly organized under and by virtue of the laws of Nebraska.

“Fifteenth—I find that the county of Thurston claims to be a duly organized county under the laws of Nebraska, and that the defendants Cobb, Wheeler, and Lemmon claim to be the lawful county commissioners, and the defendant Maryott claims to be the lawful county treasurer of said county, and all of said defendants exercised the authority and functions of their respective offices.

“Sixteenth—I find that no petition was ever signed, nor has any election ever been held, or vote taken by the inhabitants, if any, residing on the territory mentioned in the petition and in controversy herein, nor by the inhabitants residing on any part of the Omaha and Winnebago Indian reservations, to attach any of said territory to Wayne county, nor has the consent of any of the inhabitants of any of said territory or reservation ever been obtained to attach said territory to Wayne county.”

The legislature of 1881 sought to change the boundaries of Wayne county by adding to said county a strip of territory four miles wide by fourteen miles long, adjoining on the east of said county, which was a part of the Omaha and Winnebago reservation. Subsequently, in 1889, the legislature created and established Thurston county, including within its boundaries the aforesaid strip of land, containing fifty-six sections. The main question presented is the validity of the legislative enactment extending the boundaries of Wayne county. If valid, the territory in dispute is still a part of said county, and the act of 1889, which detached said territory therefrom and made the same a part of the county of Thurston, would contravene sections 2 and 3, article X, of the state constitution, because the people of Wayne county, neither by vote nor petition, asked to have said territory stricken from said county.

It is urged that the act of 1881, extending the boundaries of Wayne county, is illegal for two reasons: First, because the added territory was at the time a portion of an Indian reservation, the occupants of which had not then severed their tribal relations; therefore the legislature had no authority to attach the same to an organized county without the consent of congress; second, because the question of attaching said territory to Wayne county was never submitted to a vote of the people thereof.

In our view it will only be necessary to consider and pass upon the second or last ground of objection.

Section 3, article X, of the constitution declares that "There shall be no territory stricken from any organized county unless a majority of the voters living in such territory shall petition for such division, and no territory shall be added to any organized county without the consent of the majority of the voters of the county to which it is proposed to be added," etc. The quoted constitutional provision restricts the power of the legislature to change the boundaries of any organized county. After a county has been formed or established it is not within the author-

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ity or jurisdiction of the law-making body to change the boundaries thereof by either striking a portion therefrom, or by adding territory thereto, unless a majority of the qualified electors of the county consent to such change. It appears from the findings of the referee that no election was ever held or vote taken in Wayne county upon the proposition to annex thereto the territory in dispute. While it is true the majority of the inhabitants of said county petitioned the legislature to attach the territory, such act was not a compliance with the requirements of the statute then in force relative to the adding of unorganized territory to an organized county.

Section 9, article I, chapter 18, Compiled Statutes 1881, provides that "Where any unorganized territory, not exceeding two townships, lies adjoining to and is not embraced within the boundaries of any county, and a majority of the inhabitants of said territory petition to the commissioners of said adjoining county to be attached to the same, the county board of said county shall, within three months, order an election as provided for in sections 4, 5, and 6 of this act, and said territory shall become attached to said county by a majority vote of the same, and be subject in all other respects to the provisions of this act."

While the constitution requires that the proposition to change the boundaries of an organized county so as to include therein unorganized territory must receive the sanction of a majority of votes of the county, the legislature has by the above provision pointed out the mode of procedure. It prescribes that the manner of taking the expression of the people upon the proposition shall be by ballot at an election called for that purpose by the county board of the county. No such an election having ever been called or held in Wayne county, the territory in question was never legally a part of said county. It follows that the action must be

DISMISSED.

THE other judges concur.

J. M. MILLER V. ANTELOPE COUNTY.

[FILED SEPTEMBER 21, 1892.]

Review: PRACTICE: A MOTION FOR A NEW TRIAL is necessary to obtain a review by petition in error of the rulings of the trial court on the admission or exclusion of testimony, or to secure a review of the evidence for the purpose of determining whether it is sufficient to sustain the finding and judgment.

ERROR to the district court for Antelope county. Tried below before NORRIS, J.

B. B. Willey, for plaintiff in error.

J. F. Boyd, *contra*.

NORVAL, J.

The plaintiff in error presented to the county board of Antelope county an account for \$44.50 for medical services rendered by him to one Christian Mosher, a pauper, at the request of E. F. Skinner, a justice of the peace of said county, which claim was rejected by the board, and Miller appealed from the decision to the district court. Upon the trial there the court found the issues for the county and rendered judgment, dismissing the action.

The petition in error contains two assignments:

First—The court erred in admitting the evidence of the witness T. W. Dennis.

Second—The findings are not sustained by sufficient evidence.

We are precluded from examining either of the errors assigned, for the reason no motion for a new trial was made in the court below. The filing of such a motion was indispensable, in order to review the rulings of the court on the admission or rejection of testimony, or to secure a review of the evidence for the purpose of determining whether

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| 85 | 237 |
| 89 | 93 |
| 35 | 237 |
| 41 | 196 |
| 35 | 237 |
| 51 | 167 |
| 55 | 471 |
| 35 | 237 |
| 58 | 431 |

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it sustains the finding and judgment. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Hosford v. Stone*, 6 Id., 380; *Lichty v. Clark*, 10 Id., 472; *Cruts v. Wray*, 19 Id., 581; *Weitz v. Wolfe*, 28 Id., 500.)

As neither of the errors assigned can be considered by this court, for the reason stated, the judgment of the district court must be

AFFIRMED.

THE other judges concur.

MARTIN DEVINE V. IRA J. BURLESON.

[FILED SEPTEMBER 21, 1892.]

Forcible Entry and Detention: DESCRIPTION OF LAND. A description of a tract of land in a complaint in an action of forcible entry and detainer, before a justice of the peace of Holt county, as the "N. W. $\frac{1}{4}$ section 20, township 29, range 14 west," is not void for uncertainty, although neither the meridian, county, nor state is given. There is but one tract of land in this state to which such description is applicable, and that is situated in the county where the action was originally brought.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

M. P. Kinkaid, for plaintiff in error.

M. F. Harrington, contra.

NORVAL, J.

This is an action for the forcible entry and detainer of real property, commenced by Ira J. Burleson, before T. W. Iron, a justice of the peace of Holt county, where the plaintiff had judgment. The defendant took the case on error to the district court, where the judgment of the justice was sustained.

But a single proposition is submitted for our consideration, and that is, Does the complaint sufficiently describe the premises for the possession of which the action is brought? The description in the complaint is the "north-west quarter section 20, township 29, range 14 west." It is insisted that the description is not sufficiently definite, as neither the meridian, county, nor state is given. The objection is untenable. The description is not defective, for the premises are definitely described. There is no uncertainty as to the lands intended. True, the meridian is omitted, but the courts of this state will take judicial notice of the mode of the general government of surveying public lands, and that there is but one meridian line in this state. We know that there is but one tract of land in this state to which the description contained in the complaint is applicable, and that is situated in Holt county. The premises could be established and identified by a competent surveyor without difficulty. The case is brought within the authority of *Cummings v. Winters*, 19 Neb., 719. It was there held that a notice to quit in forcible entry and detainer, which described the premises as "the northeast quarter of section 28, 37, R. 7," sufficiently identified the property. (See *Butler v. Davis et al.*, 5 Neb., 521.)

A description in a deed like the one contained in the complaint before us would not be void for uncertainty. (*Kykendale v. Clinton*, 3 Kan., 85; *Atwater v. Schenck*, 9 Wis., 160; *Dougherty v. Purdy*, 18 Ill., 206; *Billings v. Kankakee Coal Co.*, 67 Id., 489; *Kile v. Yellowhead*, 80 Id., 208; *Smith v. Crawford*, 81 Id., 296; *Russell v. Swezey*, 22 Mich., 235.)

It follows from what has been said that the judgment of the district court must be

AFFIRMED.

THE other judges concur.

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|----|-----|
| 35 | 240 |
| 41 | 669 |
| 35 | 240 |
| 44 | 826 |
| 35 | 240 |
| 52 | 344 |

JOHN T. BELL ET AL. V. GEORGE P. PAUL.

[FILED SEPTEMBER 21, 1892.]

1. **Principal and Surety: BUILDER'S BOND: LIABILITY OF SURETY.** A contractor entered into a written agreement with the owner to furnish all materials and erect for him a building in accordance with certain plans and specifications, and deliver the same free from all liens for labor or materials; and the contract further provided that the contractor was to receive therefor a stipulated sum, payable as the work progressed, on the estimates of the architect, less fifteen per cent, which was to be retained by the owner until the expiration of ninety days from the completion of the work, and then was payable only in the event that there were no liens upon the property for labor or materials supplied through the contractor. A bond was given by the contractor, with sureties, to complete the building according to the contract, and turn the same over to the owner discharged of all liens. Payments were made to the contractor without the consent of the sureties, during the progress of the work, without estimates of the architect, and in excess of eighty-five per cent of the contract price. In an action on the bond it was *held*, that the sureties were discharged from liability.
2. **Damages.** *Held*, That the tenth instruction to the jury did not correctly state the rule of damages in an action upon the bond.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Kennedy & Learned, for plaintiffs in error:

Surety may stand on terms of his contract, and if material variation be made therein, without his consent, he will be discharged. (*Brennan v. Clark*, 29 Neb., 385; *Simonson v. Thori*, 31 Minn., 861; *Miller v. Stewart*, 9 Wheat. [U. S.], 703; *Judah v. Zimmerman*, 22 Ind., 392; *Dorsey v. McGee*, 30 Neb. 657.) The *per centum* fund to be retained under a building contract is to indemnify defendant in error against loss in case of failure of builder to complete contract, as well as a protection to sureties on

builder's bond; and defendant in error's failure to retain the fund released the sureties on the builder's bond. (*St. Mary's College v. Meagher*, 11 S. W. Rep. Ky., 608; *Calvert v. London Dock Co.*, 2 Keen [Eng.], 639; *Bragg v. Shain*, 49 Cal., 131; *Ryan v. Trustees*, 14 Ill., 20; *Dullaghan v. Fitch*, 42 Wis., 682.)

Mahoney, Minahan & Smyth, contra, cited: *Starr v. Blanter*, 76 Ia., 356; *Ryan v. Morton*, 65 Tex., 258; *Pascault v. Cochran*, 34 Fed. Rep., 358; *Casey v. Gunn*, 29 Mo. App., 14; *Haine v. Dambach*, 4 Pa. County Ct. Rep., 633; *Hagood v. Blythe*, 37 Fed. Rep., 249; *Board Sch. Drs. v. Judice*, 2 So. Rep. [La.], 792.

NORVAL, J.

This is an action by George P. Paul against Norling & Reynolds, as principals, and John T. Bell and Ed. L. Howe, as sureties, on a certain building contract bond. The trial resulted in a verdict in favor of the plaintiff below in the sum of \$1,418.86. A motion for a new trial having been filed by the defendants the plaintiff filed a *remittitur* for \$122.36, whereupon the court overruled the motion for a new trial, and rendered judgment in plaintiff's favor for the sum assessed by the jury, less the amount of said *remittitur*. The sureties bring the cause into this court for review by petition in error.

A brief statement of the facts will assist in a proper understanding of the questions presented. On the 30th day of April, 1887, Norling & Reynolds, contractors and builders, entered into a written contract with George P. Paul, by which they agreed to furnish all materials and perform all the labor necessary to build, finish, and complete in good, first-class and workmanlike manner, for said Paul, in the city of Omaha, to his complete satisfaction, a frame dwelling, plumbing and heating excepted. The material was to be furnished and the labor performed under

the supervision and direction of George L. Fisher, architect, and in accordance with the plans and specifications prepared by him. The contractors were to receive the sum of \$3,465, which was payable as the work progressed, on the estimates of the architect, which were to be based on the value of the work performed and material furnished, and the amount of each estimate was to be paid, less fifteen per cent, which was to be retained until the expiration of ninety days from the completion of the work and its acceptance by the architect and owner, and it was then to be payable only in the event that there were no liens upon the property for labor or materials supplied through the contractors. It was also stipulated in the contract that should Norling & Reynolds, at any time during the progress of the work, refuse or neglect to supply sufficient materials or workmen, or cause any unreasonable suspension or neglect of the work, or fail or refuse to comply with any of their agreements in said contract contained, then said Paul was to have the right and power to enter upon and take possession of said premises, and provide materials and workmen sufficient to finish the work, after giving forty-eight hours' notice in writing. The expense of said notice and the costs of finishing the work were to be deducted from the contract price. It was further provided that the contractors should give a bond in the sum of \$1,200 for the faithful performance of the contract, and to complete the work at time specified, and turn over the building free from all incumbrances or liens for labor or material.

On the 3d day of May, 1887, the bond in suit was executed, which contained the following condition: "Now if said Norling & Reynolds furnish all material and perform all labor in connection with said building as per said plans and specifications and contract, and turn over said building free from liens for labor or materials furnished through said Norling & Reynolds, then these presents to be void, otherwise to be of full force and effect."

Work was commenced under the contract in the month of May, and on the 3d day of September, 1887, the contractors, after having partially completed the building, either abandoned the contract or were excluded from the completion of the same by the owner, whereupon said Paul finished the job, paying for materials and labor used in completing the building the sum of \$421.43. It also appears that the owner paid the contractors during the progress of the work, prior to the alleged abandonment, \$2,422.50, and after which he paid about \$2,500 without estimates, on orders of the contractors given to the mechanics who had worked under Norling & Reynolds, and to the persons who had furnished them materials for the erection of the building. The cost of the structure exceeded the contract price in nearly the sum of \$1,900.

It is insisted that the contractors were prevented from completing the building by the owner taking possession thereof and excluding them therefrom; therefore the sureties were discharged from all liability on the bond. The question was fairly submitted to the jury, whether Norling & Reynolds voluntarily abandoned the work and refused to proceed with the same, or whether they were prevented from so doing without their consent, by Mr. Paul assuming the control of the building and the completion of the same, and they found that the contractors voluntarily abandoned the work. We think the testimony justified the finding. The reason they did not finish the job was because the architect declined to give an estimate on September 3, 1887. The fact that one was refused furnished no valid excuse to the contractors to abandon the contract and refuse to complete the building, even had they been entitled to an estimate. Until one was furnished the owner was not obliged to pay; that is clear; nor was his failing so to do any justification for their abandonment of the job.

Counsel urge that the sureties are not liable because payments were made the contractors in violation of the terms

Bell v. Paul.

of the contract. It is uncontradicted that the sum of \$300 was paid Norling & Reynolds on May 21, 1887, without an estimate of the architect; the first estimate of the architect was not furnished until seven days later. The defendant in error contends, and such, we think, is the proper inference to be drawn from the evidence, that this sum was advanced to or loaned the contractors with the understanding that the same should be refunded when the first estimate was made; that on May 28 the architect gave an estimate certifying that the contractors were entitled to a payment of \$600, less fifteen per cent. The \$300 previously advanced was then deducted therefrom, and there was paid Norling & Reynolds, under the estimate, \$210, and no more. We do not yield assent to the proposition that the advancement of the \$300, under the circumstances, released the sureties. It was not in fact, nor in law, a payment upon the contract, but a mere loan of that amount of money, until an estimate was obtained, which did not in any manner violate the contract or discharge the sureties. But payments were made contrary to the provisions of the contract. It is conceded by both parties that but six estimates were given by the architect, which amounted in the aggregate to \$2,850, less the fifteen per cent reserved by the contract, or \$2,422.50 net. The last estimate bears date August 13, 1887. The proof shows that on September 3, Norling & Reynolds applied to the architect for a further estimate, which was refused, and no other estimate was ever given; yet, notwithstanding this, the defendant in error subsequently disregarded the terms of the contract by accepting and paying orders drawn on him by the contractors in favor of different parties, for materials furnished and labor performed in the erection of the building, amounting to several hundred dollars, without the consent of the sureties, so that the entire contract price, and more, was paid to the contractors, counting the amounts paid on their orders without estimates. By the contract fifteen per cent was to

be retained by Mr. Paul and was not to be paid over by him until after the building was completed, and was then payable only in the event that there were no liens filed for labor performed or materials furnished. The provision of the contract relating to the retention of the fifteen per cent was intended as a protection of both Mr. Paul and the sureties upon the bond. It constituted a fund in the hands of Mr. Paul, with which to pay off and discharge any liens that might be filed against the building, and the sureties had a right to insist that the fund thus created should be retained, and that payments should be made according to the contract. The failure of the defendant in error to retain the fifteen per cent released the sureties. (*Bragg v. Shain*, 49 Cal., 131; *St. Mary's College v. Meagher*, 11 S. W. Rep. [Ky.], 609.)

It is insisted that the stipulation of the contract relating to payments on estimates has reference only to payments made to the contractors. Granted; but how does that affect the defendant in error? Numerous payments were made without estimates, on orders given by the contractors on Mr. Paul. The payment of these orders by the drawee was, in effect, a payment to the contractors. Nor is it material that the orders were given and paid after it is claimed the work was abandoned by Norling & Reynolds; that they had violated the contract did not justify the other party to disregard the provisions written therein on his part to be performed. A party who seeks to enforce a contract must not, himself, have been guilty of a breach thereof.

Objections are made to several paragraphs of the charge of the court, but one of which we will notice, and that relates to the tenth instruction, which reads as follows:

“If, under the testimony adduced upon the trial and the instructions above given you, you shall find for the plaintiff, you will assess as his damages such amount as the testimony shows he was obliged to and did expend in the

payment and discharge of obligations which had been incurred by the contractors for work performed and materials furnished for the erection of the building and which were actually applied to that purpose, and for which the persons performing the work or furnishing the materials would be entitled to a lien upon the building for such amounts, and which had not been paid by the contractors. But in no event can you return a greater amount in your verdict than the penalty of the bond, to-wit, \$1,200, with interest on such amount at the rate of seven per cent per annum from the commencement of this action."

This instruction is clearly erroneous, in that it fails to state the true rule of damages. By it the jury were told to allow the plaintiff the amounts paid in liquidation of claims for labor performed and materials furnished under the contract for the construction of the building, instead of limiting the recovery to the amount paid in settlement of liens against the property. The extent of the obligation of the sureties was that the contractors should complete the building and turn over the same to the owners "free from liens for labor or materials furnished through Norling & Reynolds." Further than this, they did not undertake or promise.

It is admitted that only one lien was filed against the building, which was on a claim for \$358.80, for brick furnished by one Thomas Murry, yet the judgment was for \$1,296.50, the full penalty of the bond, with interest. It is quite immaterial that the amount paid by Mr. Paul was justly due for labor performed and materials supplied in the construction of the building. As liens therefor had not been filed, the payment was entirely voluntary. Plaintiffs in error did not obligate themselves that the contractors should pay for all labor and materials, only that the building should be delivered to the owner free from all liens. Sureties are not bound beyond the terms of their engagements.

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For the reasons stated, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

_____ 52-1104

JACOB V. CONSAUL ET AL. V. FRANK L. SHELDON.

[FILED SEPTEMBER 21, 1892.]

- 1. Proceeding in Error: JOINT JUDGMENT: DEFECT OF PARTIES: WAIVER.** While all the parties to a joint judgment that is sought to be reviewed by this court by a petition in error should be made parties herein, yet, where the cause is submitted to this court on its merits, and no objection is interposed, that there is a defect of parties until after such submission, it will be taken to constitute a waiver of the absence of proper parties.
- 2. Pleadings: ALLEGATIONS TAKEN AS TRUE UNLESS DENIED.** Every material allegation of new matter in a pleading not denied by the answer or reply, for the purposes of the action is to be taken as true.
- 3. Proof of Admitted Facts: HARMLESS ERROR.** The admission of testimony to prove a fact admitted by the pleadings is error without prejudice, for which a judgment will not be reversed.
- 4. Introduction of Evidence: ORDER DISCRETIONARY.** The order in which a party shall introduce his testimony rests in the discretion of the presiding judge.
- 5. Building Contract: MEASURE OF DAMAGES FOR BREACH.** Where a building is not erected within the time limited by the building contract through the default or neglect of the contractor, the owner is entitled to recover his damages thereby sustained. In such case it is not error for the owner to prove that the building had been leased for a stipulated sum and that the tenant was to take possession as soon as the work was completed, when it is shown that the reasonable rental value exceeded the amount of rent reserved by the lease.
- 6. Credibility of Witness: HOW TESTED.** It is competent to show on cross-examination of a witness that he is hostile or

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| 35 | 247 |
| 36 | 111 |
| 35 | 247 |
| 39 | 668 |
| 35 | 247 |
| 42 | 785 |
| 43 | 888 |
| 35 | 247 |
| 44 | 589 |
| 35 | 247 |
| 45 | 281 |
| 35 | 247 |
| 51 | 330 |
| 53 | 292 |
| 54 | 468 |
| 54 | 800 |
| 35 | 247 |
| 57 | 477 |
| 35 | 247 |
| 59 | 300 |
| 59 | 451 |
| 35 | 247 |
| 60 | 363 |
| 60 | 796 |

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unfriendly towards one of the parties, and if he deny such fact, it is proper to contradict him by proving his declarations or statements made out of court. Such evidence, to be admissible, must tend to show that the witness entertains such hostility at the time of the trial.

7. ———: ———: **DISCRETION OF TRIAL COURT.** The extent to which a witness may be cross-examined for the purpose of showing his bias is within the discretion of the trial court, and unless there has been an abuse of discretion the judgment will not be reversed.
8. **Excluded Testimony: ADMITTING CURES ERROR.** Where offered testimony is excluded, the error, if any, is cured by the subsequent admission of the same evidence.
9. **Building Contract: SURETIES ON BOND.** A building contract contained a provision to the effect that the owner, during the progress of the work, might make changes or alterations in the plans of the building, and that the making thereof should not avoid the contract. In an action upon the contractor's bond it was *held* that the making of reasonable changes, which did not materially increase the costs of the building beyond the contract price, will not release the sureties.
10. ———: ———. A surety cannot urge the default of his principal as a ground for discharge from his obligation.
11. ———: **CHANGE IN PLANS.** When the plans and specifications for a building are changed after the contract is signed, without the knowledge or consent of either of the parties, the same will not vitiate the contract.
12. **Instructions.** *Held*, That there is no reversible error in the charge of the court, and that the instructions requested, which were not given, were properly refused.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

Charles O. Whedon, for plaintiffs in error.

Pound & Burr, contra.

NORVAL, J.

Jacob V. Consaul, a contractor and builder, entered into two contracts with the defendant in error for the construc-

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tion of two buildings. For the faithful performance of said contracts Consaul entered into two bonds, in the sum of \$5,000 each, with Palmer Way, Charles C. Munson, and Zehrung & Henkle as sureties. The action is on these bonds. There was a verdict in the lower court in favor of Sheldon for \$3,000, and a joint judgment was rendered thereon against all the defendants below for the amount found by the jury. The plaintiffs in error excepted, and brought the proceedings here for review upon numerous assignments of error.

The cause was submitted to this court on March 18, 1891, by written stipulation of the parties, upon printed briefs filed on the merits. Subsequently the defendant in error filed a motion to dismiss the petition in error for the want of proper parties. Before passing to the errors assigned, we will consider the question raised by the motion to dismiss.

It is insisted that Elmer E. Henkle was not made a party to the proceedings in error, and that he has not made any appearance in this court. While his name is given in the title of the cause in the petition in error as one of the plaintiffs in error, it fully appears from the body of the pleading that Munson, Way, Zehrung, and Consaul alone are seeking a reversal of the judgment. The affidavit of Mr. Henkle, filed in support of the motion, discloses that the proceedings in error were instituted and carried on without his knowledge or consent; that he never authorized any person to appear for him in this court, and never consented to be a party plaintiff or defendant, but that his name was inadvertently inserted in the petition in error. Mr. Henkle, being one of the defendants in the joint judgment sought to be reversed by these proceedings, should have been made a party, either as plaintiff or defendant. It has been held, and we think rightly, that when all parties to a joint judgment have not been made parties to the proceedings in error brought to reverse such judgment the

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defendant may have the same dismissed. (*Wolf v. Murphy*, 21 Neb., 472; *Hendrickson v. Sullivan*, 28 Id., 790.) While good practice requires that all the parties to the judgment below should be before this court, it does not follow that the motion to dismiss the petition in error, made at this late day, should be sustained. The parties, having submitted the cause on its merits, waived the objection that there is a defect of parties. Such a defect is waived unless it is taken advantage of before the submission of the case upon the record of the court below. Had the objection been timely made, the ruling upon the motion might have been different, but not having interposed the same until so late a date in the proceedings the motion to dismiss is overruled.

The first error assigned in the brief of counsel for plaintiffs in error is based upon the ruling of the trial court in admitting certain testimony of the witness E. E. Henkle. The defendant Zehrung, in his answer, denied that he ever signed or authorized any person to sign for him the bonds in suit, and avers that he and Henkle, at the time said bonds were executed, were partners in the hardware business in the city of Lincoln, under the firm name of Zehrung & Henkle; and that Henkle had no right or authority to sign the firm name to said bonds, and that said Zehrung never at any time assented thereto. The plaintiff, for reply, denied each and every allegation in said answer contained. Henkle, in his amended answer, admits that he signed the firm name to the bonds, and alleges, in substance, among other things, that such signing was within the scope of the partnership, and that Zehrung was fully apprised of the fact, and ratified the same. Upon the trial Mr. Henkle testified, in effect, over the objection of Zehrung, that he signed the name of his firm to the bonds; that when the same was signed Mr. Zehrung was in Colfax, Iowa, and on his return to Lincoln a short time afterwards witness informed Zehrung of the fact of the signing and that the ob-

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ject and purpose in so doing was to secure to the firm Consaul's patronage; that Zehrung thereupon acquiesced in what his partner had done, and the firm thereafter continued to furnish materials to Consaul under said arrangement and collected pay for the same. As the pleadings stood, the testimony of the witness Henkle, to which objection was made, was unnecessary. The allegations in Henkle's amended answer were not controverted by any other pleading filed in the case; therefore, for the purposes of the trial, it must be taken as true that Zehrung acquiesced in and ratified the signing of the firm name to the bonds. Although the introduction of testimony on that branch of the case was not necessary, its admission was not prejudicial error.

Objection is made because the court permitted defendant in error to introduce in evidence the record of mechanics' liens which had been filed against the property, before he had shown the amount due on the liens, or the amount he had paid to discharge the same. While it is true that it was indispensable that the plaintiff should prove the amounts due on these liens and the sum paid out by him to satisfy and discharge the same, it is unimportant whether such proof was introduced before or after the liens were put in evidence. After the liens were received in evidence, the amount due on each and the amount paid by the plaintiff below to satisfy the same, were amply proven. This was sufficient. The order in which a party shall introduce his testimony is discretionary with the trial court.

The objection that copies of the records of the liens, as well as the original liens, were permitted to be received in evidence is without merit. Plaintiffs in error were not in the least prejudiced thereby.

Defendant in error testified that about the time the contract was let he rented one of the buildings erected by Consaul, known as the Windsor Block, to one Criley for a term of years at \$350 a month, and that the lessee was to

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take possession the first of October, the time specified in the building contract for the completion of the work, but that he was unable to do so until the following March, owing to the fact that the building was not finished until that time. This testimony was at the time objected to by the defendants. The purpose of its introduction was to show that plaintiff had been damaged by reason of the non-completion of the building according to the terms of the contract. Testimony of what the building had been rented for was pertinent, as bearing upon the question of damages, especially when followed by other testimony, as was done in this case, showing that the reasonable rental value of the building was more than Criley had agreed to pay. The fact that the lease was in writing did not make oral testimony of the fact of the leasing, and the amount of rent to be paid, incompetent. Plaintiff having leased the property for less than its fair rental value, he could only claim as damages the amount he leased the same for during the time the tenant was kept out of possession through the fault of the contractor.

William Gray, the architect who drew the plans and specifications for the buildings, was sworn as a witness on behalf of the plaintiff below. It is now claimed that the court erred in refusing to allow him to answer certain questions propounded to him on cross-examination. After having testified on such examination that he had felt unfriendly towards the defendant Consaul at times, but had no such feelings at the time of the trial, he was asked, "Did you have a conversation with the defendant James V. Consaul, Charles P. Larson, and one Hall in front of the State National Bank of Lincoln, about the last of June, 1887; I think his name was W. J. Hall?" Witness answered, "I don't remember the man; I can't place him, but so far as the other two men are concerned I might have; I would not say that I did not." He was afterwards asked on cross-examination the following questions:

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Q. Did you at that time and place, after Mr. Consaul had left the party and before he got out of sight, say to Larson in the presence of Hall, referring to Consaul, "There goes a man I'll do up, by God"?

Q. Did you say to Charles P. Larson in your office, in the city of Lincoln, state of Nebraska, in July, 1887, in speaking of the defendant Consaul, you would do Consaul up so bad he would never do any more work in Lincoln?

Q. Did you say to Charles P. Larson at your office in June, 1887, after the contract had been let to Consaul, that Consaul had taken advantage of Sheldon, and that you would get even with Consaul?

Q. Did you say to Charles P. Larson in front of the Appelget block, on Twelfth street in the city of Lincoln, between P and Q streets, in December, 1887, about the 15th, in reply to a question of Larson's as to how Consaul was getting along, that he paid no attention to you and that you would let him go ahead until he got through and then your turn would come?

To each of these interrogatories counsel for plaintiff objected, as incompetent, immaterial, and irrelevant. The objection was sustained and the testimony excluded.

Subsequently, the defendants called Mr. Larson as a witness, and after having testified that he had had a conversation with Mr. Gray in front of the State National Bank building in the presence of Hall in the latter part of June, 1887, after Mr. Consaul had left, the witness was asked if Gray did not at that time state to him, "There goes a man I will do up, by God." He was then asked to state what Mr. Gray said in that conversation in regard to Consaul. He was also asked if, in a conversation had with Gray in his office in Lincoln, in July, 1887, Gray did not say that he would do Consaul up so bad he would never do any more work in Lincoln. Witness was further interrogated, if in the same conversation Gray did not say that "Consaul had taken advantage of Sheldon, and that he [Gray]

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would get even with Consaul for that." These questions were objected to, and the objections sustained.

It is now insisted that the questions put to the witness Gray on cross-examination and those propounded to Mr. Larson were proper, and that the court erred in not allowing them to be answered. It is no doubt true that, as a general rule, it is permissible to interrogate a witness in cross-examination as to whether he is hostile or unfriendly to the party to the suit not calling him, or whether he has not expressed feelings of hostility towards such party, and if he deny such fact, it is proper to contradict him by calling other witnesses and proving by them his declarations or statements made out of court. And this for the purpose of enabling the triers of fact to judge of the impartiality of the witnesses' testimony and the weight to be given it. It does not, however, follow from this, nor can we yield assent to the proposition, that the judgment should be reversed because answers were not taken to the questions objected to. While it is proper to prove the bias or prejudice of a witness by his evidence, given on his cross-examination, the extent of the examination is within the sound discretion of the trial court, and unless there has been an abuse of discretion the judgment will not be disturbed on account of its rulings. The rule is tersely stated in the note to section 450 of 1 Greenleaf on Evidence, thus: "The extent to which a witness may be cross-examined as to facts otherwise immaterial, for the purpose of testing his bias and credibility, is ordinarily within the discretion of the court, no rule of law being violated." We take it that it must appear from such examination that the hostility, bias, or prejudice of the witness towards a party to the suit existed at the time of the trial. (*Higham v. Gault*, 15 Hun [N. Y.], 383.)

In the case at bar the record discloses that prior to propounding the questions to the witness Gray, to which complaint is made, Mr. Gray admitted that he had felt

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unfriendly toward the defendant Consaul at times, but disclaimed any such feeling at the time he gave his testimony. It also appears, by the questions put to both Gray and Larson, that it was sought to prove the ill-feeling of the former towards Consaul nearly three years prior to the trial. Had the questions propounded been answered and such answers been most favorable to the plaintiffs in error, they would have tended only to prove what Mr. Gray had already admitted, that he had at times felt unfriendly toward Consaul. We are unable to discover that plaintiffs in error were prejudiced by excluding the testimony of the witness Gray, or that the court abused its discretion in that regard.

As the questions propounded to Mr. Gray were excluded, there was nothing for the witness Larson to contradict, and the questions put to him were properly overruled. There is another reason why the excluding of the testimony of Mr. Larson is not sufficient ground for reversing the judgment, and that is, counsel for plaintiff in error made no statement of what he expected to prove by the witness. Under the repeated holdings of this court such a statement was necessary in order to obtain a review of the action of the trial court in sustaining an objection to a question propounded to a party's own witness. (*Kearney Co. v. Kent*, 5 Neb., 227; *Masters v. Marsh*, 19 Id., 458; *Mathews v. State*, Id., 330; *Connelly v. Edgerton*, 22 Id., 82; *Burns v. City of Fairmont*, 28 Id., 866.)

On page 559 of the bill of exceptions appears an offer made by the defendant to prove by the witness Palmer Way, who was then upon the stand, that the first details furnished by the architect for the bases of the bay windows were incorrect; that the bases could not be put on because of the defective details; that the architect by reason thereof was compelled to, and did, subsequently, after the lapse of considerable time, furnish other details, and that the delay of the contractor in completing his work was occasioned by

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the failure of the architect to furnish proper details. This testimony was excluded and the ruling of the court is now assigned for error. A sufficient answer to the objection is, that the witness afterward, and before he left the stand, was permitted to, and did, testify fully upon that subject, so that the error in the ruling complained of was thereby cured.

A number of changes and alterations were made in the buildings, which increased the cost thereof, after the letting of the contracts and the signing of the bonds. But such changes and alterations did not have the effect to release and discharge the sureties, for the reason the contracts expressly provided that the owner might make alterations in the plans of the buildings and that the making of the same should not release the sureties. Each contract contained this stipulation: "Should the proprietor, at any time during the progress of the work, require any alterations of, deviations from, or additions in the said contract, specifications, or plans, he shall have the right and power to make such change or changes, and the same shall in no way injuriously affect or make void the contract." This provision was ample authority for all changes and alterations which were made in the buildings. We must not be understood as claiming that the owner had the right to make such changes as he saw proper, regardless of cost and the character and extent of such alterations. The changes and additions must be reasonable and not materially increase the cost of the buildings beyond the original contract price. The evidence shows that the alterations were not unreasonable, and that the additional labor and materials did not greatly exceed the value of the work called for by the original contract, which was omitted. Each of the contracts contained this clause: "No new work of any description done on the premises, or any work of any kind whatsoever, shall be considered as extra, unless a separate estimate in writing for the same, before

its commencement, shall have been submitted by the contractor to the superintendent and the proprietor, and their signatures obtained thereto, and the contractors shall receive payment for such work as soon as it is done. In case of days' work, statement of the same must be delivered to the proprietor, at the latest, during the week following that in which the work may have been done, and only such days' work and extra work will be paid for as such as agreed on and authorized in writing." Complaint is made because the above provision was disregarded. Obviously said stipulation was inserted in the contracts solely for the protection of the defendant in error and a compliance therewith he might waive. It was made the duty of the contractor to make and submit estimates of all new work to the superintendent and the owner, and the sureties cannot be heard to urge the failure of their principal to comply with the terms of the contract on his part to be performed, as a reason why they should be released from liability on the bonds. To do so would be to permit them to take advantage of the default of their principal, which would be contrary to legal rules.

From the testimony it appears that the word "glazed" was written on the plans of the Sheldon block, after the contract was let, without the knowledge or consent of Consaul or his sureties, thus indicating that glazed doors were to be used. The word was written on the plans by one F. C. Fisk, an employe in the office of the architect Gray, which he testified was done at the direction of Mr. Gray, for convenience, so that the specifications and plans might agree. The writing of the word "glazed" on the plans did not affect the validity of the contract, nor discharge the sureties from their obligation, for the very good reason that it nowhere appears in the testimony that Sheldon authorized or directed the writing of the word, or that it was inserted with his knowledge or consent. Again, the plaintiffs in error were not injured by thus changing the plans, for

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the reason that the word "glazed" appeared in the specifications at the time the contract was entered into. The plans and specifications were parts of the contract of the parties and were to be construed together. The contract expressly provided "that the specifications and drawings are intended to co-operate, so that any works exhibited in the drawings, and not mentioned in the specifications, or *vice versa*, are to be executed the same as if mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications." Under this stipulation, as the specifications called for "glazed" doors, the contractor was required to furnish such, although they were not called for by the plans. So that the writing of the word complained of on the plans was not such an alteration as rendered the contract void. The rights of the parties were not thereby in the least changed.

Objection is made to the giving by the court of an oral instruction to the jury during the progress of the trial. The bill of exceptions shows that immediately after the questions had been put to the witness Larson, to which we have already referred in this opinion, the court orally gave this direction to the jury: "The court instructs the jury to disregard this testimony entirely on this point." It is insisted that the court can no more instruct the jury orally during the introduction of testimony than it can charge the jury orally after the testimony is in. It is not necessary to determine whether or not the above direction of the court was in violation of the statute which requires all instructions to be reduced to writing, for it is plain that the oral instruction was not prejudicial. The court had refused to permit the witness Larson to answer all questions put to him regarding threats alleged to have been made by Mr. Gray, so there was no testimony before the jury on that subject to be considered.

Several instructions requested by the defendants the

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court refused to give to the jury, and such refusals are assigned for error. Instructions numbered 6, 7, 8, 9, and 10, requested by the defendants and refused by the court, will be considered together. It is not deemed necessary to copy them into this opinion. They are all upon the same subject and are to the effect that if, after the contracts for the erection of the buildings had been made, the contracts were changed either as to the kinds of materials, or in the plans of construction, by the verbal agreements between Sheldon and Consaul, without the consent of the sureties, the sureties would be released from liability on the bonds sued on. It is true, as a general proposition, that a material change in the terms of a contract, to secure the performance of which a bond is given, releases the sureties thereon, when such alteration is made without the assent of the surety, even though the surety may sustain no loss by the change. But the rule has no application where, as in the case at bar, the contracts expressly authorize the owner of the buildings to make reasonable alterations therein during the progress of the work, and that the same should not invalidate the contract. In such case the surety is not released by reason of the making of such changes by the owner, notwithstanding the surety did not consent thereto.

The court did not err in refusing requests numbered 13 and 14. The first of which states, in substance, if the jury find that the plaintiff or his architect, Gray, caused to be written on the plans of the building known as the Sheldon block, at the openings indicating doors, the word "glazed" after the bond and contract for said building were executed and after the contractor had entered upon the erection of the building, and that the insertion of said word was without the consent of the sureties on such bond, then the jury should find for said sureties. One fault with this request is that it assumed that there was testimony before the jury upon which they could find that the plaintiff caused the word "glazed" to be written on such plans,

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when the bill of exceptions contains no testimony from which such an inference could be drawn. Another objection to the request is, it ignores the evidence which tended to show that the original specifications for said building called for glazed doors. If such evidence was true, then, under the provision of the contract already mentioned, which required the contractor to execute work called for by the specifications, although not mentioned in the drawings, and *vice versa*, the writing of the word "glazed" on the plans was not a material change or alteration thereof. The fourteenth request lays down the proposition that if the architect, after the contract and bond were given, wrote, or caused to be written, certain words in the specifications of the Sheldon block without the consent of the signers of said bond, the plaintiff cannot recover thereon. The instruction was properly refused. The insertion of the words mentioned in the request could not have the effect to release the sureties, unless the plaintiff authorized the writing of the same, or consented thereto; to establish which there is not a particle of evidence.

The defendants' eighteenth request to the court to instruct the jury, which was refused, reads as follows: "The contracts set out in the pleadings in this case each provide that in case of payments, which are to be made as the work progresses, a certificate shall be obtained from the architect to the effect that the work is done in strict accordance with the drawings and specifications, and that he considers the payment justly due. The jury is instructed that these certificates, unless impeached for fraud or mistake, are conclusive as to the character of the work done prior to the making of such certificates, and the plaintiff cannot now be heard to say that the work done before the making of such certificates was not done in strict accordance with the drawings." The plaintiff below on the trial and in his pleading claimed damages by reason of the use by the contractor in the construction of the buildings of poor and in-

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ferior materials, defective workmanship, and the omission to perform certain work and furnish materials called for by the terms of the contracts. The evidence discloses that from time to time, during the progress of the work, numerous payments were made by Sheldon to Consaul upon certificates furnished by the architect to the contractor. The theory of the defendants is that such payments having been made upon the certificates of the architect, without making any objection as to the manner in which the work was being done, plaintiff is estopped, under the provisions of the contracts, from now insisting that work was not done in accordance with the plans and specifications, unless he first impeach the certificates of the architect for fraud or mistake. Two cases decided by the supreme court of Illinois are cited in support of the contention of plaintiffs in error upon this point. This court has also decided that the certificate of the architect is conclusive as to the character of the work done prior to the making of such certificate. But neither of the contracts in the cases passed upon by this court, nor those before the Illinois court, contained all the provisions which are to be found in the contracts we are considering. While each of these contracts provides for the payment to the contractor, as the work progressed, eighty per cent of the contract price, upon the certificate of the architect to the effect that the work is done in strict accordance with the drawings and specifications, and that he considered the payments justly due, each also contained the further stipulation, which is not found in either of the contracts before the court in the cases alluded to, that "said certificate, however, in no way lessening the total and final responsibility of the contractor, neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill or not, according to the drawings and specifications, either in execution or materials." The parties having by this clause agreed that the certificate of the architect should not be conclusive, it

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was not error for the court to refuse to charge the jury as requested by the eighteenth instruction. To have done so would have been prejudicial to the plaintiff.

The record shows that the buildings were not completed within the time mentioned in the contracts. The fault, in part, was with the contractor. There is also evidence tending to show that some delay was caused by the failure of the architect to furnish the details for the work. The defendants requested the court to charge the jury, by the sixteenth and twenty-third instructions, that if any delay in the completion of the buildings was occasioned by the failure of the architect to furnish the details, the sureties are not liable for any damages caused by the contractor not completing the work in time. While neither Consaul nor the sureties are liable for damages resulting from any delays caused by either the plaintiff or the architect, it is not true that the defendants are thereby relieved from liability for loss resulting to the plaintiff for delays attributed solely to the default or neglect of the contractor. For his own delays he and the sureties must respond in damages. This question was fairly submitted to the jury by an instruction given by the court on its own motion.

Exceptions were taken by the defendants to several paragraphs of the charge of the court. The objections urged against the instructions have, we think, been sufficiently answered in the foregoing discussion, and it can serve no useful purpose to now review the objections. It is sufficient to say that we find nothing in the charge to the jury that calls for a reversal of the case. The judgment is

AFFIRMED.

THE other judges concur.

EBENEZER HARDS V. PLATTE VALLEY IMPROVEMENT COMPANY.

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| 35 | 263 |
| 444 | 291 |
| 35 | 263 |
| 53 | 418 |

[FILED SEPTEMBER 28, 1892.]

- 1. Corporations: CAPITAL STOCK: SUBSCRIPTION: ACTION TO RECOVER.** Where the subscription contract of a proposed corporation fixes the capital stock at a certain sum—as \$4,000, divided into shares of \$100 each—the whole amount of capital so fixed must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of the subscribers to the stock to recover an assessment on the several shares, unless there is a provision in the subscription contract to proceed in the execution of the main design before the whole amount of capital is subscribed.
- 2. ———: ———: WAIVER OF CONDITIONS OF CONTRACT: EVIDENCE.** There is testimony in the record which tends to show that the defendant waived the conditions of the contract in respect to the amount of stock to be subscribed before entering upon the main purpose of the corporation, viz., the construction of a public hall, and this should have been submitted to the jury.
- 3. Directing Verdict.** The court erred in directing a verdict.

ERROR to the district court for Merrick county. Tried below before POST, J.

Rice & Watson, and J. C. Patterson, for plaintiff in error.

A. Ewing, and J. W. Sparks, contra.

MAXWELL, CH. J.

This is an action brought by the defendant in error against the plaintiff in error to recover on a subscription for stock to an association, the general nature of whose business was declared in the articles of incorporation “shall be the erection and operation of a suitable hall for the use of societies, organized meetings, or such other purposes as the trustees may see fit for the benefit of the stockholders.” The petition alleges that the amount of capital stock was

Hards v. Platte Valley Imp. Co.

fixed at \$4,000, which was all in good faith subscribed before the bringing of this action.

The defendant, in the third paragraph of his answer, after denying that the plaintiff below is a valid corporation, says: "And defendant further answering says that he admits that on or after the 23d day of September, 1886, he subscribed for one share of stock for \$100 in said pretended plaintiff corporation, but alleges that said subscription by said defendant for said share of stock was made with the express agreement and understanding by and between said pretended corporation and said defendant that the full amount of the capital stock of said pretended, and at said time prospective, corporation had been taken and subscribed for, including said defendant's subscription, by good, lawful, solvent, and *bona fide* subscribers, and that said subscription and contract thus made by and between said pretended and prospective corporation and said defendant, was conditional and was not to be valid and binding upon said defendant unless said full amount of capital stock had been and was subscribed for, including said defendant's subscription; and defendant further says, that under and by virtue of said conditional agreement and conditional subscription for said stock, but without any knowledge upon his part that said full amount of capital stock had not been subscribed, or without waiving or intending to waive any of his rights under and by virtue of the terms of said conditional agreement and subscription for said stock, he paid six months' assessments on installments of \$2.50 each, commencing in September, 1886." He then proceeds to allege that there were certain misrepresentations made to him in regard to the proposed lease of a certain lot for ninety-nine years, and that the building plans had been modified, etc.

The testimony tends to show that a contract for a perpetual lease for the lot spoken of was obtained, but that there was a mortgage for a considerable amount on the property.

The testimony also shows that but thirty-seven shares of stock, in the aggregate \$3,700, were in good faith subscribed when the work was undertaken and the building erected and suit brought.

In *Estabrook v. Omaha Hotel Co.*, 5 Neb., 78, Judge GANTT quoted with approval the case of *Fry's Ex'r v. Lexington, etc., R. Co.*, 2 Met. [Ky.], 323-4, that "where a given amount of stock is required to be subscribed before the corporation is authorized to go into operation, this requisition must be regarded as an indispensable condition precedent. Each subscriber undertakes to pay the amount of his subscription only in the event and upon the condition that the whole amount of the capital stock required by the charter to enable the company to organize and commence operations in its corporate capacity shall be subscribed. And in *Livesey v. Hotel Co.*, 5 Neb., 66, 67, the same able judge says: "The rule seems to be well established, that when the charter or subscription contract specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the whole amount of capital so fixed and required for the accomplishment of the main design of the company must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of subscribers to stock to recover an assessment levied on the shares of stock, unless there is some clear provision in the contract to proceed in the execution of the main design with a less subscription than the whole amount of capital specified. This rule seems to be founded on the principle that, by the terms of the grant to the corporation, it is essential to the power of assessment for the general objects and purposes of the institution that the whole capital stock required by the condition precedent must be represented and acted upon by the assessment. This doctrine has undergone an exhaustive discussion in many cases, and it is not deemed necessary to bring into view the arguments in support of it. (*Salem Mill-dam Co. v. Ropes*, 6 Pick. [Mass.], 23; *Id.*, 9 Pick., 195; *Cabot & West*

Hards v. Platte Valley Imp. Co.

Springfield Bridge v. Chapin, 6 Cush. [Mass.], 53; *Schurtz v. S. & T. R. Co.*, 9 Mich., 269; *Topeka Bridge v. Cummings*, 3 Kan., 76; *Somerset Railroad Co. v. Clarke*, 61 Me., 384; *N. H. Central R. Co. v. Johnson*, 30 N. H., 404; *Peoria & Rock Island R. Co. v. Preston*, 35 Ia., 118.) And the rule is the same in England. (*Fox v. Clifton*, 6 Bing. [Eng.], 776; *Pitchford v. Davis*, 5 M. & W., 2; 4 Moody & M., 151.)” Those cases were very fully considered and the authorities examined.

It may not be improper to state that the very able judge before whom the Nebraska cases cited were tried in the district court, after the argument in this court became convinced that he had erred, and when but one of his associates was present, and before the opinions were written, announced that the cases would be reversed, the court being unanimous.

Second—There is some proof tending to show that it was proposed to increase the capital stock to \$6,000, and some of the shares were taken on that basis. It is evident there was no actual change in the proposed amount of capital stock; that still remained at \$4,000, and the proposition to increase the stock to \$6,000 was not adopted. It is unnecessary, therefore, to consider that phase of the case.

Third—There is some testimony tending to show that the defendant below waived the conditions of the contract of subscription as to the amount subscribed so as to permit the erection of the building in question with less than \$4,000 capital stock subscribed. This should have been submitted to the jury for their consideration. The court, therefore, erred in directing a verdict and rendering judgment thereon. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NORVAL, J., concurs.

POST, J., did not sit.

MISSOURI PACIFIC RAILWAY COMPANY V. EDWIN TWISS
ET AL.

[FILED SEPTEMBER 28, 1892.]

1. **Common Carriers: CONNECTING LINES: AGENCY.** Where several common carriers unite to form a line for the transportation of merchandise and receive goods and give a through bill of lading, each carrier becomes the agent of the others to carry into effect the transportation and delivery of the property.
2. ———: **RECOVERY FOR ANOTHER'S NEGLIGENCE: ULTIMATE LIABILITY: EVIDENCE.** The testimony tends to show that the property in question, a piano, was injured through the negligence of the defendants and no one else; that they had attempted to settle the damages caused thereby both before and after suit was brought; that they were witnesses in two trials to recover such damages, and must have known that they were ultimately responsible for the same.
3. ———: ———: **NOTICE TO PARTY ULTIMATELY LIABLE: EFFECT OF JUDGMENT.** In such case knowledge of the pendency of the suit and its object, and that if a recovery was had it would be for the default of the defendants and no one else, is sufficient to impose upon the defendants the duty of making any defense they may have to the action, and in case they fail to do so the judgment will be conclusive against them as to the amount of the judgment.
4. ———: ———: ———: ———: **MEASURE OF DAMAGES.** The measure of damages is the amount of the judgment, interest thereon, and taxable costs.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

B. P. Waggener, and *A. N. Sullivan*, for plaintiff in error:

Where several carriers unite to complete a line of transportation and receive goods for freight and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line

the damage is received. (*Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. R. Cases, 392; *Texas & P. R. Co. v. Ferguson*, 9 Id., 395.) Where receiving carrier has to pay damages for neglect of connecting line, it has a right of action against the carrier at fault. (*C. & N. W. R. Co. v. N. L. Packet Co.*, 70 Ill., 217.) And in the latter case the measure of damages is the amount recovered in the first action, where the carrier at fault has knowledge of its pendency. (*C. & N. W. R. Co. v. N. L. Packet Co.*, *supra*; *Littleton v. Richardson*, 34 N. H., 179; *Veazie v. R. R.*, 49 Me., 119; *Portland v. Richardson*, 54 Id., 46; *Seneca Falls v. Zalinski*, 8 Hun [N. Y.], 571; *Robbins v. Chicago*, 4 Wall. [U. S.], 657; *Boston v. Worthington*, 10 Gray [Mass.], 496.)

Beeson & Root, contra.

MAXWELL, CH. J.

It is alleged in the petition, in substance, that during the month of October, 1886, the defendants were common carriers of goods and merchandise from the plaintiff's depot in Louisville, Nebraska, to the depot of the C., B. & Q. R. R., in said village, about the distance of one mile; that on the 11th day of that month one J. P. Young shipped a piano from Weeping Water on the line of plaintiff's railroad to be carried to Louisville and there delivered to the C., B. & Q. R. R., to be transported on the latter road to Plattsmouth; that the defendants received freight in less than car load lots from the plaintiff at its depot in Louisville to be by them carried to and delivered to the C., B. & Q. R. R. at its depot there; that they were in fact an intermediate transportation company; that the plaintiff fully performed all the conditions of said contract on its part and delivered said piano in good condition to the defendants at Louisville, to be transported by them to the depot of the C., B. & Q. R.

R. at that place to be forwarded to Plattsmouth; that the defendants so negligently performed their duty in transferring said piano as to permit the same to fall out of the vehicle on which it was being carried and it was thereby broken and damaged; that said Young thereupon brought suit against the plaintiff for said injuries and recovered a judgment against plaintiff for the sum of \$150 and costs of suit taxed at \$63.05; that said judgment was affirmed by the supreme court; that of all said suits and proceedings the defendants had due notice; that there is due from the defendants to the plaintiff the sum of \$302.48, with interest from the 4th day of April, 1889.

The answer of the defendants consists of a number of specific denials, which need not be noticed.

On the trial of the cause the jury returned a verdict in favor of the plaintiff for the sum of \$106.75, upon which judgment was rendered.

The testimony shows that the plaintiff, in connection with other common carriers, undertook to carry the piano beyond its own line and deliver the same to Young; in other words, several common carriers in effect formed a line for the transportation of the property beyond the limits of their respective lines and gave in this case a through bill of lading. In such case each carrier is the agent of the others to accomplish the carriage and delivery of the goods. (*R. Co. v. Campbell*, 36 O. St., 647; *Beard v. St. L. & A. T. H. Ry. Co.*, 44 N.W. Rep. [Ia.], 803; *A., T. & S. F. R. Co. v. Roach*, 35 Kan., 740; *K. C., St. J. & C. B. R. Co. v. Rodebaugh*, 38 Id., 49; *Tex. & P. R. Co. v. Fort*, 9 Am. & Eng. R. R. Cases [Tex.], 392.)

That the piano was injured by the negligence of the defendants is not denied, and is clearly shown by the proof. In such case the party sustaining the injury may bring his action directly against the carrier committing the injury, or against the one that undertook to transport the goods. (*A., T. & S. F. R. Co. v. Roach*, *supra*; *U. P. Ry. v.*

Marston, 30 Neb., 241.) As between the carriers, however, each one is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation of property beyond its own line, and damages may be recovered against it for a failure in that regard, yet the carrier causing the injury will be liable to it for such damages; in other words, the party guilty of the wrong is ultimately liable therefor. This doctrine, in another form, has frequently been applied where a covenantee has been evicted from possession by paramount title. (*Smith v. Compton*, 3 B. & Ad. [Eng.], 407; *Williamson v. Williamson*, 71 Me., 442; *Bever v. North*, 107 Ind., 544; *St. Louis v. Bissell*, 46 Mo., 157; *Wendel v. North*, 24 Wis., 223; *Mason v. Kellogg*, 38 Mich., 132; 2 Black on Judgments, sec. 567.)

In *Bever v. North*, *supra*, it was held that it was unnecessary to allege in the petition that the covenantor was required to defend. It was held that the covenantee need not appeal from the judgment of ouster, but might rely on his judgment. In this class of cases it is necessary to give notice to the covenantor in order that the judgment may be conclusive against him, and he should not only be notified of the action, and be requested to defend it, but if he desires should be allowed to do so to the utmost extent of the law. (*Eaton v. Lyman*, 26 Wis., 61.)

The above rules have been applied to cases where persons are responsible over to another either by express contract or operation of law. Thus, where damages were recovered against a sheriff for the escape of a prisoner caused by its failure to provide a jail, and he in turn sued the county for its neglect in that regard, it was held that the record of the judgment against the sheriff might be received in evidence against the county to show the amount he was compelled to pay. (*Coms. v. Butt*, 2 O., 348.) So, where a judgment has been recovered against a municipal corporation for injuries caused by an obstruction or defect

in the public road or street of which the wrong-doer has notice, is conclusive evidence of the obstruction or defect in the road or street, the injury to the individual, and the amount of damages. (*Milford v. Holbrook*, 9 Allen [Mass.], 17; *Boston v. Worthington*, 10 Gray [Mass.], 498; *Davis v. Smith*, 79 Me., 351; *Littleton v. Richardson*, 34 N. H., 187; *Robbins v. Chicago*, 4 Wall. [U. S.], 657.)

Where the action is brought against a municipality for a wrong committed by a third person by reason of which the municipality is liable and judgment is recovered against it, it has been held in a number of cases that it was sufficient if the wrong-doer knew that the suit was pending for that cause and he could have made his defense if he so desired. It is said in one case: "The legal presumption is that he knew he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit." (*Robbins v. Chicago*, 4 Wall., 657; *Chicago v. Robbins*, 2 Black [U. S.], 418.) In other words, where the wrong for which the city was sued was committed by the defendant alone, and if a judgment is recovered against it, it will be because of such wrong. The knowledge of the wrong-doer that an action is pending to recover for the injury is sufficient notice to him to justify his action, and if possible prevent a recovery, and that if judgment is recovered he will ultimately be liable.

In the case at bar the defendant Twiss was called as a witness in both the county and district courts. He recognized his liability for the damages, both before and after suit was brought, by endeavoring to effect a settlement of the same. It is true the proof fails to show an actual request to defend the action, but as he and his partner had committed the injury, they must have known they were ultimately liable for the same, and the plaintiff had an action over against them. Having this knowledge, it was their duty to defend the action if such defense they had. There is a material difference between a case like the one

M. P. R. Co. v. Twiss.

at bar and one where an action is brought by a covenantee against his covenantor. There the nature of the covenant claimed to have been broken, as well as the existence of the covenant itself, may be in issue, as well as the claim of the plaintiff. So if an action is brought against a municipality for an injury from a defective sidewalk which it was the duty of the lot-owner to maintain in good repair, notice may be required because the lot-owner may be presumed to have no knowledge of the injury, or that it occurred on his premises, or even that the sidewalk was defective. Where, however, the party knows that the injury was caused by himself and no one else, and that if a recovery is had it will be because of his neglect and wrong, it is sufficient that he has knowledge of the pendency of the suit and could defend if he so desired. (*Chicago v. Robbins*, 2 Black [U. S.], 418; *Robbins v. Chicago*, 4 Wall. [U. S.], 657, 672.)

The case was tried upon the theory that the defendants were not bound by the amount of the judgment, and the instructions are based on that view of the law. The measure of damages which the plaintiff is entitled to recover is the amount of the judgment against it with interest and costs. (*Ottumwa v. Parks*, 43 Ia., 119.) The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GERMAN INSURANCE COMPANY OF FREEPORT, ILLI-
NOIS, v. JOSEPH B. PENROD ET AL.

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| 35 | 278 |
| 44 | 582 |
| 35 | 273 |
| 49 | 817 |

[FILED SEPTEMBER 28, 1892.]

1. **Continuance: ABSENT WITNESS: AFFIDAVIT.** In an action upon a policy of insurance it appeared that the loss occurred December 24, 1889; that suit was begun May 9, 1890, and the issues made up June 30, 1890; that at the September term of the district court the case was passed till November 24th, when the trial was set for the 28th, on the morning of which day the defendants' attorneys filed certain affidavits, in which they stated, in substance, that the state agent was absent; that they did not know of his whereabouts; that he possessed important papers and that they could not safely proceed to trial without him, but failed to state what papers he possessed, or what they expected to prove by him, or any reason for the failure to take his deposition. *Held*, That the court did not err in overruling the motion for a continuance.
2. **Fire Insurance: BUILDING IN COURSE OF ERECTION: LOSS BEFORE OCCUPANCY.** Where the testimony showed that the agent had power to and did issue the policy; that he filled out an application for insurance upon a building in process of construction, to be signed by the owner, and stated in the application that the building was being erected, although it was intended for the use of tenants and was stated in the policy to be so occupied, *held*, that, construing the several provisions of the application together, it did appear that the building was in course of construction, and being burned before it was completed, the fact that the building was vacant was no defense.
3. —: **AGENT'S AUTHORITY.** As the agent had power to issue the policy, he had authority also to make any changes as to the person entitled to the benefit thereof which did not increase the risk; therefore, where the policy was for \$1,000 and a mortgage named in the application for \$700 was executed by the insured, an assignment of so much of the policy as would cover the mortgage was authorized by the agent. *Held*, Within his powers.
4. **Evidence** *held* to sustain the verdict, and there is no material error in the instructions.
5. **Valued Policy Act.** No particular objection has been pointed out in the statute of 1889, and it is sustained.

ERROR to the district court for Gage county. Tried below before APPELGET, J.

Rickards & Prout, for plaintiff in error.

A. H. Babcock, and *Geo. A. Murphy*, contra.

MAXWELL, CH. J.

This is an action brought in the district court of Gage county to recover \$1,000 on a policy of insurance on a dwelling house. On the trial of the cause the jury returned a verdict in favor of Penrod for \$1,000, less \$700 in favor of Parker as mortgagee, on which judgment was rendered. The loss occurred on the night of the 24th of December, 1889, and this action was brought May 9, 1890, and the issues were made up June 30 of that year. The case stood for trial at the September term of the district court of that county, but apparently by consent was passed until near the close of the term. On the 24th of November, 1890, the case was set down for trial on the 28th of that month. On the 28th the attorneys for the defendant below filed affidavits asking that the case be continued till the foot of the docket was reached, and, in effect, saying in their affidavits that they could not be ready for trial without the testimony of the general agent of the company, and that they had been unable to reach him by telegraph or otherwise. There is no statement of what facts it was expected this agent would testify to, nor are we informed of any reason why his deposition has not been taken. If the showing made for a continuance would be held sufficient it would be possible to continue any case. It appears that the trial took place on the 2d of December, 1889, and the jury was discharged on the next day. The defendants below do not seem to have been forced to trial with undue haste and have no just cause of complaint in that regard.

The testimony shows that in the summer of 1889 Pen-

German Ins. Co. v. Penrod.

rod was erecting a dwelling house in the city of Beatrice; his brothers were doing the carpenter work and seem to have worked on this house when not otherwise employed; that the plaintiff Penrod is a painter and working at his trade, and performed labor on the house when not painting for others; that in the latter part of August, 1889, the agent of the defendant below at Beatrice spoke to a brother of Penrod about insuring the house. This was communicated to Penrod, who took out a policy for three years, paying the premium therefor. The application was filled out by the agent, and states that the house was in course of erection; that there was an incumbrance on it for \$800. The agent, who seems to have had knowledge of the manner in which the house was being erected, filled out the application, and issued the policy with that knowledge. The house was designed to be rented when completed, and it is stated in the application to be in the occupation of a tenant. This was not intended as a statement that the house was then occupied but was designed to apply to the property when it was completed. The insured seems to have trusted implicitly to the agent, who may be presumed to be familiar with the ordinary mode of filling out applications, and seems to have acted to some extent upon his own knowledge. The agent testifies:

Q. Did you negotiate this policy with the plaintiff Penrod?

A. Yes, sir.

Q. Where did you meet Mr. Penrod first?

A. J. B. Penrod I met in my office.

Q. How long did you talk with him before you effected this insurance?

A. Well, I couldn't tell exactly, but a very few minutes.

Q. Did you go and examine the property at that time?

A. No, sir.

Q. State whether he reported to you the condition of the property.

German Ins. Co. v. Peurod.

A. He told me the building was not completed.

Q. Who drew up this policy?

A. I did.

Q. When?

A. The 26th day of August, 1889.

Q. Was that the same day the application was made?

A. Yes, sir.

Q. When did you deliver it?

A. I can't tell exactly when I did deliver it; if I remember right they came in after it—sometime after.

Q. This clause here in regard to permission to complete building, is that in your handwriting?

A. Yes, sir.

Q. Now this clause in regard to the "Loss payable to mortgagee as his interest may appear, October 9, 1888," did you write that?

A. Yes, sir.

Q. Now you may state whether you sent this policy in to the general company before you delivered it.

A. No, sir.

Q. Did you have the power to issue policies?

A. Yes, sir.

Q. Did you have power also to note these remarks that I called your attention to?

A. Yes, sir.

Here we have an agent who, so far as appears, is the sole representative of the insurance company at Beatrice. He is authorized to receive applications for insurance, determine whether or not they are satisfactory and issue policies thereon. Having this power, he fills out an application for the insured to sign, obtains his signature to the same and the premium demanded, and thereupon in the name of his principal, whose accredited agent he is, issues a policy of insurance. The insured having complied with all the requests of the agent and paid the premium, naturally supposed that in case of total loss he would be indemnified to

the extent of the insurance. The policy purports to be given in good faith as a contract of indemnity in case of loss. It is not to be hedged about with onerous or impracticable conditions which have a tendency to defeat its object in whole or in part. If an agent may make a contract to bind the insurer, the terms and conditions of that contract are necessarily under his control. The general rule applies, that the principal will be bound by the apparent authority of the agent, and the apparent authority of the agent in this case justifies the insured in relying upon his assurances in filling out the application and the leave indorsed on the policy to borrow \$700, which will presently be noticed.

It appears that on the 4th day of October, 1889, Penrod executed a mortgage for the sum of \$700 to H. W. Parker for money borrowed, and upon application the agent indorsed on the policy "October 9, 1889, loss, if any, payable to H. W. Parker, mortgagee, as his interest may appear." This was signed by the agent. As heretofore stated, the agent had power to issue the policy, and that carries with it power to make a change in the beneficiary. This in no-wise affected the risk and is unavailing.

It is claimed that the evidence fails to sustain the verdict. We think differently, however. There is no charge of fraud or bad faith on the part of the insured. The company has received and retained the premium. A contract of insurance is for indemnity in case of loss. To many honest persons the failure to pay without an expensive lawsuit means great embarrassment, sometimes bankruptcy. If unconscionable pretexts can be used to defeat a just claim for a loss, the insured is not only robbed of the amount paid for a premium but also of his property, and experience has shown that such pretexts can nearly always be found where they are available.

The verdict, in our view, is the only one that should have been rendered. It appears that the adjuster of the

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company, after the loss, went to Beatrice, and the insured went with him into the office of the agent, where apparently there were none others in the room. The adjuster then locked the door and then informed the insured that they would not pay the loss because the premises were vacant. The evident purpose was to effect, if possible, a reduction of the amount of claim for the loss. No one can object to a manly claim for such a reduction where there are any apparent grounds for the same, but the course pursued in this case, as disclosed by the record, would seem to be unworthy of a reputable company.

Some objections are made to the instructions, but no particular error has been pointed out and they seem to be correct.

Objections are also made to the valued policy act of 1889, but in our view it is a valid act, and the amount allowed for prosecuting the action is not excessive. There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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| 43 | 280 |

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| 35 | 278 |
| 61 | 855 |

FRED W. GRAY, APPELLANT, V. GEORGE ELBLING ET AL., APPELLEES.

[FILED SEPTEMBER 28, 1892.]

- 1. Bill of Exceptions: TIME FOR ALLOWANCE: SIGNED BY JUDGE AFTER TIME EXPIRED.** Upon the facts shown by the record it does not appear that there was an order extending the time to prepare a bill of exceptions or application for an extension of time. There was no authority, therefore, for the judge to sign the bill, and a motion to quash is well taken.
- 2. Pleadings.** Upon the issues made by the pleadings the plaintiff is entitled to judgment.

Gray v. Elbling.

3. ———: DEFECTIVE ANSWER. An answer in effect that the defendant is not indebted the full amount claimed in the petition is not a denial of any fact on which the right to recover depends and raises no issue.

APPEAL from the district court for Saunders county.
Heard below before MARSHALL, J.

Frank Dean, for appellant.

Geo. W. Simpson, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against George Elbling to foreclose a mechanic's lien on lots 9 and 10, in block 20, in the County Addition to Wahoo. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. It appears from the affidavits on file that the action was submitted to the court in July, 1890, and taken under advisement; that on the 16th day of August of that year a decision was rendered.

It is claimed on behalf of the plaintiff that the time in which to prepare a bill of exceptions was extended forty days from the adjournment of the court *sine die*, and the affidavits of the plaintiff's attorney, and also of the clerk of the court, are filed in support of that contention. On the other hand, the defendant and his attorney both swear that there was no such extension of time. The district judge overruled the motion to correct the record to show such extension—in effect holding that no order extending the time had been made. He signed the bill of exceptions, however, on the 8th day of October, 1890, and within the time which he was authorized to grant an extension of time and sign the bill. It would seem to be proper, where any reasonable excuse is given for the failure to present the bill within the time limited by the order of the court, but within the limit fixed by law to which it may be ex-

tended, for the judge to make an order extending the time and thereupon sign the bill if correct; and if he refused to extend the time, to refuse also to sign the bill. Such refusal would make a direct issue as to the right of the party presenting the bill to have the same authenticated without the delay and expense incident to docketing the cause in this court to be here determined whether or not the judge had authority to sign the bill. If such authority existed the manner of its exercise ordinarily could not be called in question. The law in relation to the preparation and signing of bills of exceptions is remedial in its nature and should be liberally construed. This rule prevails in some of the common law states and is fundamental under the Code. The judge, by overruling the motion to enter the alleged order extending the time to forty days from the rising of the court, in effect held that no such order had been made, and it does not appear that there was any cause whatever for the delay. The bill was signed, therefore, without authority, and the motion to quash the same is sustained.

On the face of the pleadings, however, it is apparent that the judgment is wrong and cannot be sustained. The petition is as follows, omitting the title:

“The plaintiff complains of the defendant George Elbling for that on or about the 21st day of April, 1887, plaintiff entered into a verbal contract with the defendant George Elbling to furnish to him building material for the erection of a dwelling house on lots 9 and 10 in block 20, County Addition to Wahoo, Nebraska, the city of Wahoo, Saunders county, state of Nebraska. In pursuance of said contract plaintiff furnished to said defendant George Elbling building material, consisting of doors, windows, shingles, lumber, lime, etc., an itemized account of the same, with credits and offsets, being set out in the mechanic's lien filed and recorded in the clerk's office in said county, and a copy of which is attached hereto and made a part hereof,

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for the erection of said dwelling house, said material being furnished on and between the 21st day of April, 1887, and the 8th day of July, 1887, amounting to the sum of \$311; that on the 20th day of April, 1887, said defendant George Elbling paid to said plaintiff the sum of \$60, and on the 7th day of May, 1887, said defendant George Elbling returned windows, and for which said plaintiff gave him credit for \$16.20, and on the 18th day of May for shingles returned said plaintiff gave him, said George Elbling, credit for 81 cents, amounting in the aggregate to the sum of \$77.01, leaving a balance due in favor of said plaintiff amounting to the sum of \$233.99.

“The defendant George Elbling at the time plaintiff furnished said material was the owner in fee of said lot.

“That on the 8th day of November, 1887, and within four months from the time and of furnishing said material the plaintiff made an itemized account in writing of said material furnished the defendant George Elbling, under said contract, together with all credits and offsets, and after making oath thereto as required by law, filed the same in the clerk's office of Saunders county and claimed a mechanic's lien therefor upon said lots and the buildings thereon for the sum of \$233.99, with interest at ten per cent per annum from the 8th day of November, 1887. The sum of \$233.99 with interest at ten per cent per annum from the 8th day of November, 1887, now remains due and unpaid on said account.

“That the defendants Anna Elbling and Theodore G. Dockstader have or claim some lien or interest in said premises, but plaintiff avers that the same is subordinate to plaintiff's claim, and plaintiff asks that they be compelled to set the same up, or be forever cut off from asserting the same.

“Plaintiff therefore prays judgment against the defendant George Elbling, for the sum of \$233.99, with interest at ten per cent per annum from the 8th day of November,

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1887, and costs of suit, and that said premises may be sold and the proceeds thereof applied to the payment of said judgment, interest, and costs, and for such other and further relief as may be just and equitable."

To this Elbling answered as follows:

"The defendant George Elbling, for his separate answer to the petition of plaintiff, says: He admits buying certain lumber and building material from Fred W. Gray, plaintiff herein, in the year 1887; admits making payments on account of said purchase to the amount of \$77.01.

"This defendant denies that plaintiff, within four months of the furnishing of the material mentioned and set forth in his petition, made an itemized account in writing of the same as required by law and filed the same with the clerk of Saunders county, Nebraska; denies that plaintiff has any lien upon lots 9 and 10, block 20, in the original town of Wahoo, and denies that plaintiff has any lien upon the property of this answering defendant.

"This defendant admits that he is indebted to the plaintiff, on account of lumber and building material sold by plaintiff to this defendant, but denies that the balance due plaintiff amounts to the sum of \$233.99.

"This defendant admits that Anna Elbling and Theodore G. Dockstader have an interest in and to the premises of this defendant, and this defendant denies each and every allegation in plaintiff's petition not herein specifically admitted.

"The defendant further says the pretended mechanic's lien set out by plaintiff was not filed within four months of the furnishing the material to the defendant to construct a house, and that the last item of said account was by the defendant brought long after the material for the construction of his house was furnished; that the same, the two screens, were not included in any estimate or bill of material furnished to or ordered by this defendant for the construction of a dwelling house."

The reply is a general denial.

An itemized copy of the account is made a part of the petition and need not be copied here, as there is no dispute as to the items in the account having been received by Elbling, nor that the first item was furnished April 21, 1890, and the last July 8 of that year, or that these materials were furnished under a verbal contract for the erection of said house. Elbling in his answer "admits buying certain lumber and building material from Fred W. Gray, plaintiff herein, in the year 1887; admits making payments on account of said purchase to the amount of \$77.01." He "denies that the plaintiff filed his mechanic's lien within four months, because the last item was a disconnected transaction." There is no allegation in either the petition or answer that an estimate was made and any of the material furnished thereunder. So far as the pleadings show there was a verbal contract to furnish material to build a house; in effect, that the defendant procured all or a considerable part of the material to be used in the erection of his house from the plaintiff. Some of that furnished was taken back and Elbling received credit therefor.

An examination of the account shows that all through the latter part of May and the month of June, 1890, material was furnished from a week to ten days apart. Thus, May 28, 1890, is an item for lumber; June 8 are two items for lumber; June 15 are four items of lumber; June 21 are three items. The next item is July 8, for screen doors. These would naturally be put on about the time the house was completed, and, so far as appears, the account had been kept open up to this time. The screen doors were furnished for the house, and, so far as appears, were placed thereon, and this court has no right to assume that there were separate contracts when the defendant has stated no facts showing such to be the case.

The same question was raised directly by a sufficient answer in *Ballou v. Black*, 17 Neb., 389. In that case

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"the lumber furnished by plaintiff for the erection of defendant's building was delivered in five parcels of nearly equal value: one on the 12th, one on the 14th, one on the 17th, one on the 20th, and one on the 28th days of September, and the sworn statement for lien was filed for record on the 25th day of November of the same year; held, that the same constituted but one delivery, and that the lien was filed in due time to cover the whole." It is said (p. 396) "The time within which the whole of the lumber was delivered, according to the plaintiff's bill, was reasonable, and as to time should be treated as one delivery." This case was adhered to in *Ballou v. Black*, 21 Neb., 131. The rule stated in these cases seems equally as applicable in the case at bar.

The defendant Elbling denies that he is indebted to the plaintiff in the full amount claimed in the petition, but admits he is indebted to him. How much less he is indebted he does not state. The smallest fraction of one cent less than the amount claimed would sustain that defense, if defense it may be called. It is well settled under the Code that the plea of *nil debet* is not sufficient, as it puts in issue no fact. (*Wells v. McPike*, 21 Cal., 215; *Seeley v. Engell*, 17 Barb. [N. Y.], 530; *Drake v. Cockroft*, 4 E. D. Smith [N. Y.], 34; Maxwell, Code Pl., 393.) Under the issues as presented, therefore, the plaintiff is entitled to judgment for the full amount of his claim, and to the foreclosure of his lien upon the property.

There is a denial in the answer that the plaintiff's lien attaches to "lots 9 and 10, in block 20, in the original town of Wahoo." The plaintiff has made no claim of that kind and the answer does not meet the averments of the petition. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLIE ROBB V. STATE OF NEBRASKA.

[FILED SEPTEMBER 28, 1892.]

1. **Larceny: EVIDENCE: POSSESSION OF STOLEN PROPERTY.** The possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a question of fact exclusively for the jury.
2. ———: ———: **INSTRUCTIONS.** On a prosecution for larceny, a charge that "the possession by an accused person of personal property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie*, and calls upon him to prove the innocence of his possession," is erroneous, in that it omits to state that it is only when the possession is unexplained that the inference of guilt arises, and because it is in effect an instruction that the burden of proof shifted during the trial to the defendant.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

W. L. Cundiff, for plaintiff in error:

It was error for the court to instruct the jury that the possession by an accused person of property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie*, and calls upon him to prove the innocence of his possession. (*People v. Ah Ki*, 20 Cal., 178; *Thompson v. People*, 4 Neb., 529; *People v. Juan Antonio*, 27 Cal., 404; *Durant v. People*, 13 Mich., 352; *State v. Merrick*, 19 Me., 398; *Thompson on Trials*, 2535; 1 Phillips, *Evidence*, 638; *People v. Norega*, 48 Cal., 123; *People v. Chambers*, 18 Id., 383; *State v. Hodge*, 50 N. H., 510; 1 Greenleaf, *Evidence* 34; 3 Id., 31.)

George H. Hastings, Attorney General, *contra*, cited: *Thompson v. People*, 4 Neb., 528; *Thompson v. State*, 6

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Id., 107; *Smith v. State*, 17 Id., 361; *McLain v. State*, 18 Id., 158; *State v. Merrick*, 19 Me., 398; 1 Phillips, Evidence, 634; Sackett, Instructions, 746; *Sahlinger v. People*, 102 Ill., 241; *Fowle v. State*, 47 Wis., 545; *State v. Pennyman*, 68 Ia., 216; *Johnson v. Miller*, 29 N. W. Rep. [Ia.], 743.

NORVAL, J.

The plaintiff in error was informed against in the Lancaster county district court, charged with the larceny of a gold watch from the person of one Henry Burcham on the 10th day of September, 1890. On the trial plaintiff in error was convicted and sentenced to imprisonment in the penitentiary for the period of two years and six months.

A number of errors are assigned in the motion for a new trial, but the giving of the fourth paragraph of the charge to the jury only is relied on for a reversal in this court. The instruction to which objection is made reads as follows:

“You are instructed that the possession by an accused person of property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie*, and calls upon him to prove the innocence of his possession. In this case, then, if you find from the evidence that the watch in question was stolen from the person of Henry Burcham at the time and place as alleged, and if you further find from the evidence beyond a reasonable doubt that shortly after the alleged theft the defendant herein had the watch in his possession, then the presumption *prima facie* would be that the defendant stole the watch, and such presumption would be sufficient to warrant you in finding that the defendant did steal the watch from the said Burcham at the time and place alleged in the information, unless the defendant would make some explanation, or account for the possession of said watch, upon some theory, other than having gained the

possession of said watch by theft. But in this case, if the evidence offered by the defendant as to the manner in which he came into the possession of said watch satisfactorily accounts for the possession of said watch to your minds, or leaves a reasonable doubt in your minds as to whether or not he gained the possession of said watch honestly or not, then you should give the defendant the benefit of such explanation or doubt and acquit him."

At the consultation it was agreed that the giving of the above was seriously prejudicial to the rights of the accused. In a criminal prosecution for larceny the rule is that the possession of stolen property, recently after a larceny thereof, when unexplained, may be sufficient to warrant the jury in drawing an inference of guilt of the party in whose possession it is found. The effect to be given to the fact of possession is solely for the jury to determine when considered in connection with all the other facts and circumstances proven on the trial. (*Thompson v. People*, 4 Neb., 529; *Thompson v. State*, 6 Id., 102; *Grentzinger v. State*, 31 Id., 460; 2 Thompson on Trials, 1894.)

The first part of the instruction, although in the exact language used by this court in the opinion in *Smith v. State*, 17 Neb., 361, is, we think, faulty. It omits to state that it is only where the possession of goods recently stolen is unexplained that the presumption *prima facie* of guilt arises. Again, the use in the charge of the sentence, "and calls upon him to prove the innocence of his possession," is certainly objectionable, as it is, in effect, an instruction that the burden of proof shifted during the trial to the accused. While the defendant was required to introduce evidence tending to show that he came honestly by the watch, he was not obliged to establish the innocence of his possession thereof by a preponderance of the evidence, as the jury were in effect instructed by the court. If the testimony created a reasonable doubt in the minds of the jury upon that point, the defendant was entitled to an acquittal.

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True, by the last part of the charge the jury were told, in effect, that if they entertained a reasonable doubt as to whether the defendant obtained possession of the watch honestly or not, they should acquit, yet this did not cure the misstatement of the law upon that point in the same instruction, for the reason that the jury were left in doubt as to which portion of the instruction contained a correct statement of the law. (*Wasson v. Palmer*, 13 Neb., 376; *Fitzgerald v. Meyer*, 25 Id., 77; *Ballard v. State*, 19 Id., 609.) For the reason stated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

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RUDOLPH ULDRICH ET AL. V. IDA GILMORE ET AL.

[FILED SEPTEMBER 28, 1892.]

1. **LIQUORS: DEALER'S BOND: SURETIES.** Where a liquor dealer's bond contains no provision for the payment of all damages which may be adjudged against him under the license law, no action can be maintained against the sureties thereon for damages resulting from the sale of intoxicating liquors by the principal in the bond.
2. ———: ———: **ACTION BY MARRIED WOMAN: INSTRUCTIONS: MEASURE OF DAMAGES.** In an action for damages by a married woman against a saloon-keeper for loss of means of support resulting from the sale of liquors to her husband, it is error to instruct the jury that habits of the husband prior to the acts complained of are immaterial. Although the fact that he drank to excess will not defeat a recovery, yet such fact may properly be considered by the jury as affecting the measure of damages.
3. **Defendants' instructions, as modified by the court, were properly given.**

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Hastings & McGintie, for plaintiffs in error, cited: *Boyer v. Barr*, 8 Neb., 71; *Roose v. Perkins*, 9 Id., 315; *Boldt v. Budwig*, 19 Id., 745; *Rouse v. Melsheimer*, 46 N. W. Rep. [Mich.], 372; Comp. Stats. Neb., ch. 50, secs. 15, 16.

Abbott & Abbott, and *W. J. Bryan*, *contra*, cited: *Bollman v. Pasewalk*, 22 Neb., 766; *Thomas v. Hinkley*, 19 Id., 328; *Elshire v. Schuyler*, 15 Id., 561; *Kerkow v. Bauer*, 15 Id., 150; *McClay v. Worrall*, 18 Id., 52; *Warwick v. Rounds*, 17 Id., 416; *Roberts v. Taylor*, 19 Id., 190.

NORVAL, J.

This action was brought by defendants in error, a married woman and her minor children, against the principals and their sureties on two liquor bonds to recover damages resulting from a loss of means of support caused by the intoxication of Thomas Gilmore, the husband of Ida Gilmore and the father of the other plaintiffs. The verdict of the jury was in favor of the plaintiffs below, with an award of damages assessed at \$500.

The errors relied upon to procure a reversal of the judgment are as follows:

1. The admission in evidence of the two bonds declared upon.

2. The damages assessed by the jury are excessive.

3. The verdict is contrary to the fifth and sixth paragraphs of the instructions asked by the plaintiffs.

4. The court erred in giving the first instruction asked by plaintiffs.

5. The court erred in changing the first and second instructions requested by defendants.

6. The court erred in refusing defendants' third instruction.

It is first insisted that the trial court erred in permitting the introduction in evidence of the saloon bonds sued upon in this action. The bonds are alike, except as to the names of the makers. Each bond runs to the village of Tobias, is for the sum of \$5,000, and contains the following condition: "Now if the above bounden * * * shall in all respects comply with chapter 50 of the Compiled Statutes of Nebraska, entitled 'Liquors,' and shall furthermore comply with ordinance No. 6 of village ordinances, entitled 'An ordinance licensing and regulating the sale of malt, spirituous, and vinous liquors within the village of Tobias,' and moreover pay promptly all fines, penalties, and forfeitures that may be adjudged against the said * * * then and in such case this obligation to be void, otherwise it shall remain in full force and effect."

By section 6 of chapter 50 of the Compiled Statutes, it is provided that the bond given by an applicant for liquor license shall be conditioned that "he will not violate any of the provisions of this act, and that he will pay all damages, fines, and penalties and forfeitures which may be adjudged against him under the provisions of this act."

It will be observed that the bonds in suit do not comply with the requirements of the above quoted statutory provision, in that they contain no provision for the payment of damages. A surety is only liable according to the terms of his obligation. Beyond that he is not answerable. This is an action for damages, and as the sureties never obligated themselves to pay any damages resulting from the liquor traffic, the suit as to them must fail. (*Sexson v. Kelley*, 3 Neb., 104).

As to the persons named as principals in the bonds, they are personally liable, without reference to their bonds, for any injury occasioned by the furnishing of intoxicating liq-

uors to Thomas Gilmore. This question was passed upon in *Roose v. Perkins*, 9 Neb., 304, and *Jones v. Bates*, 26 Id., 693. If all the allegations in the petition relating to the bonds were eliminated therefrom, the petition would still state sufficient facts to constitute a cause of action against Conrad Most and Rudolph Uldrich.

It is next insisted that the court erred in giving the following instruction at the request of the plaintiffs: "The court instructs the jury for plaintiffs that the habits of Thomas Gilmore prior to May 1, 1888, are immaterial, and if you believe that said Thomas Gilmore bought liquor of the defendants Most and Uldrich, and that the purchase and use of such liquor damaged these plaintiffs, then you should find in their favor for the amount of such damage, even though you should further believe that said Gilmore was an intemperate man before May 1, 1888." The fact that the husband and father drank intoxicating liquors to excess prior to May 1, 1888, the date of the saloon license, will not preclude the plaintiffs from maintaining their action. Under the statute every person who furnishes intoxicating liquors to another, although he may be a drunkard, is liable for all the damage which results therefrom. While the fact of the intemperate habits of Mr. Gilmore prior to, and at the time of, the sales in controversy does not relieve the saloon-keepers from responsibility, yet such fact may properly be considered as affecting the measure of damages. The instruction was prejudicial and should not have been given. (*Dunlavy v. Watson*, 38 Ia., 398; *Rouse v. Melsheimer*, 82 Mich., 172; Black on Intoxicating Liquors, sec. 324.)

Complaint is made of the changing by the trial court of the first and second instructions requested by defendants. By these requests it was sought to limit the right of compensation to damages caused by the use of intoxicating liquors, of which some part was furnished by some one of the defendants. The instructions were changed by substi-

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tuting the words "contributed to" for "caused," and as thus changed were given. In this there was no reversible error. As already stated the defendants were liable for all damages resulting from the use of intoxicants by Gilmore to which the liquors furnished by them to him contributed. (*Kerkow v. Bauer*, 15 Neb., 150; *Elshire v. Schuyler*, Id., 561; *Warrick v. Rounds*, 17 Id., 416; *McClay v. Worrall*, 18 Id., 52; *Roberts v. Taylor*, 19 Id., 190.)

Lastly, it is insisted that the court below erred in refusing to give the defendants' third request. The substance of it having been given by the court in other instructions, it was not error to refuse to repeat it. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

RICHARD L. MILLS V. ISAAC B. TRAVER.

[FILED SEPTEMBER 28, 1892.]

1. **Ejectment: PLEADING: DESCRIPTION OF LAND.** In an action of ejectment to recover certain real estate which the petition described by metes and bounds, commencing at the southeast corner of the northwest quarter of the northwest quarter of a specified section, town, and range, a motion to make the petition more definite and certain, by requiring the plaintiff to set forth therein by some definite landmark or survey where said corner is situated, was *held* properly overruled.
2. ———: **ADVERSE POSSESSION: PUBLIC LAND: HOMESTEAD: WHEN STATUTE BEGINS TO RUN.** A party acquired title to public lands under the United States homestead law, to a portion of which another person claims title by adverse possession, *held*, that the statute of limitations did not begin to run against the party entering the land in favor of the one holding adversely, until the right to the patent was completed by the per-

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formance of every act required of the entryman by the homestead law.

3. The evidence, although conflicting, is sufficient to sustain the finding that the possession of the defendant of the land in question had not been adverse and exclusive for the period of ten years before the commencement of the suit.

ERROR to the district court for Merrick county. Tried below before POST, J.

A. Ewing, and Lee & Thompson, for plaintiff in error.

John Patterson, and Webster & White, contra.

NORVAL, J.

On the 1st day of August, 1888, defendant in error commenced an action in the district court of Merrick county to recover the possession of the strip of land described in his petition by metes and bounds. The plaintiff in error filed a motion to make the petition more definite and certain, which was overruled by the court, and an exception to the ruling was entered upon the record. Afterwards an answer was filed, denying that defendant in error is the owner of the land in controversy, or is entitled to the possession thereof, and alleging that plaintiff in error has been in the open, notorious, exclusive, adverse, and uninterrupted possession of said strip of land, as owner, for more than ten years prior to the bringing of the suit. The reply is a general denial. There was a trial to a jury, with verdict and judgment for defendant in error. The jury also made special findings as follows:

“Question 1. Of the two surveys referred to by the witnesses, to-wit, that made by McLean in the year 1869, and that made by Patterson in the year 1888, which one, if either, do you find was correct, and which survey, if either, fixed and established the true dividing line between the premises of the plaintiff and defendant? Answer. The Patterson survey. I. H. CASTLE, *Foreman*.

"Question 2. Had the defendant been in the actual, adverse, exclusive, and uninterrupted possession of any part of the premises in controversy for the period of ten years previous to the commencement of this action, to-wit, August 1, 1888? If so, state what part thereof. Answer. No. I. H. CASTLE, *Foreman*."

Complaint is made in the brief of counsel for plaintiff in error of the overruling of the motion to make the petition more definite and certain, by "requiring the defendant in error to set forth therein by some definite landmark or survey where the southeast corner of the northwest quarter of the northwest quarter of section 6, township 13 north, of range 5 west, in Merrick county, is situated." Said corner is the point mentioned in the petition where the pleader starts to bound the tract therein described, and which is in litigation herein. The petition does not allege how said corner is marked, whether by a visible mound, stake or stone, nor was such an allegation necessary to enable a person to locate the land in controversy. The motion was properly overruled.

No complaint is now made of the rulings of the court below on the trial, or of the instructions given and refused. But it is insisted that the verdict of the jury is not sustained by the evidence, which objection we will now consider.

The parties own adjoining lands. The plaintiff in error is the owner of the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter of section 6 of township 12, range 5, in Merrick county, and also lots 7 and 8 of said section. Defendant in error owns the west half of the northwest quarter and the west half of the southwest quarter of said section 6. The controversy is as to the location of the true line dividing their lands, each party claiming that the strip in dispute is within the boundary lines of his land.

It appears in evidence that plaintiff in error entered all

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of his land, with the exception of lots 7 and 8, under the provisions of the United States homestead law, in 1868. For the purposes of locating the corners of his homestead, he had the same surveyed in 1869 by one John McLean, the county surveyor of the county. Defendant in error entered the said west half of the northwest quarter under the timber culture acts of congress on September 22, 1873, and acquired title thereto by virtue of a patent issued to him on March 20, 1886. To the west half of the southwest quarter he acquired title by purchase. In 1888, M. Patterson, the acting county surveyor of the county, at the request of Mr. Traver, surveyed the said lands of plaintiff and defendant and located the line dividing their premises, which line is some eighty links east of the one surveyed by Mr. McLean in 1869. The question is, which survey was correct? If the Patterson survey truly located the line dividing the premises of the parties, then the strip of land in controversy is embraced within the boundary of the lands owned by defendant in error; otherwise not. Whether said survey is accurate and correct depends entirely upon whether the point where Mr. Patterson started to run his lines was the true northwest corner of section 6, as established by the government surveyor. That the place where Mr. Patterson started his survey was the true governmental corner was testified to by defendant in error and several of his witnesses, while the testimony of plaintiff in error and his witness is to the effect that the northwest corner of said section 6 is twenty-two feet west of the place where the Patterson survey commenced. It is impossible to reconcile the testimony of the witnesses. The evidence bearing upon the question was submitted to the jury under proper instructions and they found that the Patterson survey was correct, and located the line dividing the premises of the parties. The finding, being sustained by the evidence, will not be molested.

One question remains to be considered. Has plaintiff in

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error acquired title by adverse possession? As to that part of the strip in dispute lying north of the quarter section line and west of Mills's homestead, there is evidence tending to show that for ten years prior to the bringing of the suit Mr. Mills had plowed and planted to crops up to within a distance of a few feet of the line located by the McLean survey, which plaintiff in error says he left for a private way to the section line road. Conceding that he was in the exclusive possession thereof as owner for the statutory period, yet he did not acquire title thereto by such possession, for the reason the same was a part of Traver's timber claim and he had not complied with the law so as to entitle him to a patent for the land until 1885, or about three years before suit was commenced. The statute of limitations did not commence to run against defendant in error until his right to the patent was complete. (*Carroll v. Patrick*, 23 Neb., 847; *Gibson v. Chouteau*, 13 Wall. [U. S.], 92; *Sparks v. Pierce*, 115 U. S., 408; *Simmons v. Ogle*, 105 Id., 550; *Nichols v. Council*, 9 S. W. Rep. [Ark.], 305; *Steele v. Boley*, 22 Pac. Rep. [Utah.] 311.)

As to the remainder of the strip which lies south of the quarter section line and west of said lots 7 and 8, there is a sharp conflict in the testimony bearing upon the question of Mills's possession of the same. The above mentioned lots were taken by him as a timber claim in the fall of 1877. The testimony introduced by plaintiff in error tends to show that prior to said year a few furrows had been plowed on the strip in controversy by a prior occupant of said lots 7 and 8; that in the spring of 1878 Mr. Mills planted a row of forest trees along the east side of said strip on said plowing, about twelve feet apart; that subsequently he planted other trees between them, which are now standing and growing, and that during a portion of the time since 1878 plaintiff in error has cultivated and farmed said plowed strip of ground. The testimony on the part of the defendant in error is to the effect that the

trees were not planted by Mr. Mills until the spring of 1879, and that afterwards, and prior to the commencement of this action, one John Good, a tenant of Traver's, with the knowledge of Mr. Mills, and without any protest or objection upon his part, harvested the hay for two years on said strip west of the row of trees. This was admitted by Mr. Mills upon the witness stand. The first act of possession of plaintiff in error was the planting of the trees already mentioned, and if they were not put out until the year 1879, as some of the witnesses testify, and the jury must have so found, then it is clear that he has not been in possession of said strip of land for ten years prior to the bringing of this suit. But even though the trees were planted in 1878, still plaintiff in error's possession has not been exclusive and uninterrupted for the statutory period, for the reason that the continuity of his possession had been broken. The verdict of the jury is sustained by the evidence, and the judgment is

AFFIRMED.

MAXWELL, CH. J., concurs.

POST, J., took no part in the decision.

ADDISON ROADS, APPELLANT, V. EXPERIENCE ESTABROOK, APPELLEE, IMPLEADED WITH J. B. WHITTIER, APPELLANT.

[FILED SEPTEMBER 28, 1892.]

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1. Taxes: FORECLOSURE OF LIEN. In an equitable proceeding to foreclose a lien for taxes the court will not consider questions which go only to the manner of the assessment or levy of the tax in question or other irregularity or informality in the proceedings.

2. ———: VALIDITY OF ASSESSMENT: FAILURE TO RECORD PLAT.

In the summer of 1854 one J. surveyed the site of the city of Omaha and subdivided it into lots and blocks and streets and alleys, marking all corners with hardwood stakes. He made a manuscript plat of the area surveyed, showing the streets and alleys, lots and blocks, but containing no figures indicating the dimensions of the lots or the width of the streets and alleys. Said plat was soon afterward lithographed and has ever since been generally recognized as authentic by the public and property owners of the city. In 1857 the mayor, who had in the meantime entered said town site, under the laws of congress, in trust for the owners and occupants thereof, conveyed by deed certain lots therein to the defendant, who immediately inclosed them in accordance with the lines run by J. and the stakes as originally set by him. He has since repeatedly recognized said plat and survey as authentic by executing leases and conveyances of parts of said property by reference thereto. The property of the city, including the lots in controversy, has from the first been assessed for taxation in accordance with the said plat, and the streets adjacent to said lots improved by the city at great expense. *Held*, That taxes assessed against said property when listed for taxation according to the description on the said plat will not be held void for the reason that said plat was never recorded.

- 3. Defective Title: RECOVERY OF TAXES PAID.** When the title of a purchaser for delinquent taxes shall fail he is entitled to recover in a proceeding to foreclose his lien, not only the taxes for which the property in question was sold and such as are subsequently levied, but also such as were levied for previous years and paid subsequent to the date of his purchase.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Montgomery & Jeffrey, for appellants:

In a proceeding in equity to enforce a tax lien the court will look to the statute and not to the assessment as the foundation of such lien, and will regard the amount of taxes against the property, as borne upon the books of the county, as unalterably established. (*Otoe County v. Mathews*, 18 Neb., 470; *Lammers v. Comstock*, 20 Id., 345; *Merriam v. Dovey*, 25 Id., 622.) Where there is no re-

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corded plat of city property, a description by lot and block, referring to the recognized survey, is sufficient for levy and assessment of taxes, and by the recognized survey the description by lot and block is definite. (*Holls v. Streitz*, 16 Neb., 249; *Bryant v. Estabrook*, Id., 223; *Janesville v. Markoe*, 18 Wis., 356; *Finney v. Boyd*, 26 Id., 356.)

E. Estabrook, contra:

Land cannot be assessed for taxes as a village lot where there is no recorded plat. (*Johnson v. Scott*, 11 Mich., 232; *Munley v. Gibson*, 13 Ill., 308; *Jones v. Johnston*, 18 How. [U. S.], 154; *People v. C. & A. R. Co.*, 96 Ill., 369; *Shepard v. Shepard*, 36 Mich., 174; *Sandford v. People*, 102 Ill., 374; *Sharpe v. Dillman*, 77 Ind., 280; *Merton v. Dolphin*, 28 Wis., 459; *People v. Reat*, 107 Ill., 584; *Village of Winnetka v. Prouty*, Id., 221.)

Post, J.

The plaintiff herein filed in the district court of Douglas county five petitions praying for decrees of foreclosure of tax liens upon as many separate lots of land, to-wit: the east thirty-two feet of lot 2, and all of lots 3, 6, 7, and 8 in block 70 in the city of Omaha. The several actions were consolidated by order of the district court and tried together. From the judgment of the district court the plaintiff appeals. From the bill of exceptions it appears that on the 8th day of September, 1875, the property above described was sold by the treasurer of Douglas county to plaintiff for delinquent taxes and that treasurer's deeds were subsequently executed in his favor. The deeds aforesaid it is conceded are void on account of informalities in their execution. Plaintiff has also paid taxes subsequently assessed against each of said lots. In the action involving lot 3 Jackson B. Whittier is made a defendant since he also claims a lien by reason of a subsequent purchase for delinquent taxes. He answered setting up his lien and

praying for a decree of foreclosure. There is no controversy with respect to the purchase of the property for delinquent taxes, or the amounts of the payments therefor, by plaintiff or Whittier. The defenses relied on are two in number and will be noticed in the order presented.

“First—That the proceedings of the assessor and other officers preceding the charging of the taxes upon the books of the city and county treasurers were irregular and of so defective a character as to render the taxes charged void and not a lien upon the property.”

The principal objections to the proceedings are that the property was not listed by the owner, and no refusal to list, or other reason why not so listed, was given by the assessors; that the assessor's oath was not attached to the rolls; that the name of the owner was not, in most instances, given, and, in such instances, that the lots were not assessed as unknown, and other like irregularities. No claim is made to the effect that the amounts charged were excessive, or that the payment thereof would burden the defendant beyond his fair proportion of the taxation required for the needs of the public. It has been frequently held by this court that in equitable proceedings to foreclose liens for taxes we will not consider objections which go only to the manner of the assessment, or the levy of the tax, or the conducting of the sale. (See *Otoe County v. Mathews*, 18 Neb., 466; *Lammers v. Comstock*, 20 Id., 345; *Merriam v. Dovey*, 25 Id., 622.) These cases are in point and are conclusive of the question.

The second defense is that the property in question has no legal existence, for the reason that no such description of land is anywhere recorded. The material facts, as shown by the bill of exceptions, are as follows: Early in the year 1854 several citizens of the state of Iowa associated themselves together under the corporate name of the Council Bluffs and Nebraska Ferry Company, for the purpose of locating a town on a site within the present boundaries of

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the city of Omaha. For that purpose they employed A. D. Jones to make a survey of the premises. At that time Nebraska had just been organized as a territory, but no part thereof had been surveyed by the government.

Mr. Jones began his work on the west bank of the Missouri river, near what is now known as Iler's distillery, from thence he ran a line west to Sixteenth street, and from thence north and west to about Byron Reed's present addition to the city, and from thence directly north to Webster street, and from thence east to the Missouri river, and thence along the line of the river south to the place of beginning. The claim thus laid out was known as the claim of the Council Bluffs and Nebraska Ferry Company. Afterwards the company employed Jones to survey a part of this claim into lots and blocks, streets and alleys; he did so, and made a plat of the area now lying between Jackson street on the south, Webster street on the north, Ninth street on the east, and Sixteenth street on the west. He made a manuscript plat thereof, and the town which he thus laid out was called Omaha. He designated the corners of lots and blocks and streets and alleys with hardwood stakes driven into the ground. Such stakes remained in existence for many years thereafter, and many of them up to a comparatively recent date, but at the present time all have rotted away or have been otherwise destroyed. According to this survey and the plat subsequently prepared by Mr. Jones, block 70, the property in controversy, was subdivided into eight lots fronting endwise toward the east and west. The dimensions of the lots and blocks were not indicated on the plat, but from the bill of exceptions it appears that the lots were sixty by one hundred and thirty-two feet in size. Block 70, as shown by the Jones plat and all subsequent plats and maps of the city, is bounded as follows: On the east by Ninth street, on the west by Tenth street, on the south by Capitol avenue, and on the north by Davenport street.

From the plat or manuscript map aforesaid the first printed map of Omaha was copied, and which has since been known as the A. D. Jones map. In the year 1855 the company aforesaid caused another plat to be made, embracing the area surveyed by Jones and including other contiguous territory, all of which they called the plat of Omaha city. That part surveyed by Jones was not resurveyed, and there never has been a survey for the purpose of designating streets and alleys, lots and blocks, other than that of Mr. Jones. Upon the plat of the second survey and the map subsequently issued in accordance therewith no dimensions of lots or streets and alleys appear. Upon it block 70 is designated as on the first or Jones map, subdivided into eight lots, but fronting endwise toward the north and south instead of the east and west as on the Jones map. In 1857 another map was printed, known as the Poppleton & Beyers map, purporting to embrace the same area as the former maps. On this map block 70 appears as on the Jones map, except that the lots front endwise to the north and south as in the last named map. Afterward a map was issued by O. F. Davis, which, with respect to block 70, followed that of Poppleton & Beyers'. It appears that the two maps last named were in common use during a limited time only. They were followed by maps issued by Byron Reed and Geo. P. Bemis, which, as regards block 70, conform to the Jones survey and map. Subsequent maps have followed the Jones survey. During the years when the taxes in controversy were levied, either the Reed map, or others subsequently issued, but conforming to the Jones survey, have been in general use in the city.

Shortly after the Jones survey the land included therein was entered in trust for the owners and occupants thereof, by the mayor of Omaha, who subsequently conveyed the property, designating the lots and blocks as indicated by the Jones map. In the summer of 1855 defendant Estabrook

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took possession of the lots in controversy, and has ever since continued in possession thereof, either by himself or tenants. On the 5th day of May, 1857, Enos Lowe, mayor, conveyed said lots to defendant by deed, which is the basis of his title. In said deed, at the instance of the defendant, the description of the lots is made to conform to the subdivisions of the Jones map, and also of that of Poppleton & Beyers, the description being as follows: "All those tracts or parcels of land being in the city of Omaha, * * * as originally surveyed by A. D. Jones, and lithographed by the Council Bluffs and Nebraska Ferry Company, to-wit, lot 8, in block 70, being the south half of lots 7 and 8, of the plat of Poppleton & Beyers," etc. He testifies that he had the property thus described in accordance with both maps as a precaution in order to avoid future doubt or uncertainty as to the boundaries of his property. It appears from the testimony of J. M. Woolworth, who prepared the form of deed used by the mayor, and before whom most of the deeds were acknowledged, that as a rule such deeds contained no reference to any plat or map except the so-called Jones map. Among other things the witness says: "Some of the parties applying for deeds requested that reference be made to the plat of Poppleton & Beyers, but not many." Mr. Poppleton testifies that the Poppleton & Beyers map was a business venture of the firm of which he was a member. It was prepared by his partner, and he is unable to say whether or not the latter had ever surveyed the territory in question or had ever been engaged in subdividing any part thereof into lots and blocks.

It is apparent to us from the record that the maps prepared from the Jones survey, and on which the lots in block 70 front endwise to the east and west, are the ones generally recognized and accepted as correct by the property owners and the public officers of the city of Omaha and Douglas county. In accordance with that survey the

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property of the city has been assessed for taxation for more than thirty-five years. Omaha has in that time grown from a frontier village to a city of 150,000 inhabitants. Defendant's property has in the meantime increased in value many times. Thousands of dollars have been contributed by adjoining proprietors as taxes levied by the county and city, which have been expended for costly improvements, thereby enhancing the value of the property in question. Shall he now be relieved from his just contribution to the public revenue because the original proprietors of the town site have neglected to comply with a direction of the statute, to have a copy of the plat filed and recorded in the proper office? The survey, although irregular in not recording the courses, distances, etc., is the one through which defendant must trace his title for any purpose. From the stakes set out by the surveyor the boundaries of the lots were readily determined, and according to them he enclosed the lots in 1855. He has also subsequently recognized the accuracy of the survey and map of Mr. Jones by leases and conveyances of parts of the property in question. For instance he has frequently executed leases for parts of the property which must be referred to the Jones survey, as otherwise they would include property which he did not own, occupy, or claim. Thus far we have made no reference to the case of *Bryant v. Estabrook*, 16 Neb., 217. In that case the same question was presented, involving the same property, when it was held that the city of Omaha, having in fact been laid out into streets and alleys, lots and blocks, more than twenty-five years previous, during all of which time the streets and alleys had been used and enjoyed by the public and the lots taxed as such, the regularity of the proceeding, including the laying out, platting, and recording thereof, will be presumed. It is urged that on the facts of this case it is distinguishable from that, but we think otherwise. The view we are disposed to take is that the facts

disclosed by the evidence in this case, except as to the filing and recording of the plat, are those which, as said by the court in *Bryant v. Estabrook*, will be conclusively presumed.

In a brief of considerable length and unusual merit counsel for defendant has assailed the rule as well as the reasoning in *Bryant v. Estabrook*. In that case it is said: "The authorities are not all one way, and yet it is perhaps fair to say the weight of authority cited sustains his (defendant's) position." We are constrained to make the same admission. The earlier cases and many recent ones in other states tend to establish the rule that for the purpose of taxation the property must be described by reference to the government survey, or, if subdivided, by reference to an authenticated plat. The proposition, however, is that on the facts in this case the defendant is in no position to invoke that rule in his behalf. Such was the view of the court in *Bryant v. Estabrook*. We are convinced that the rule there announced is in all respects equitable, and are satisfied to adhere to it.

There is a further contention, viz., that as a considerable portion of the taxes in question were paid by plaintiff after his purchase in 1875, and were levied for years prior to the taxes for which he purchased, he cannot recover in this action. This claim is based upon the language of the act of 1871, which provides that "such purchaser, his heirs or assigns, may pay all taxes lawfully assessed on the real estate after such purchase, and when the said title shall fail shall have a lien for all such taxes."

In *Miller v. Hurford*, 11 Neb., 385, the land had been sold for the taxes of 1873 and 1874. In the decree of foreclosure, taxes subsequently paid for the years 1870 and 1871 were included. In the opinion the present chief justice says: "We are not entirely clear as to the right of the plaintiff to include taxes paid for the years 1870 and

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1871, but no objection is made to the judgment on that ground." In *Shoenheit v. Nelson*, 16 Neb., 235, the chief justice, referring to the doubt expressed in *Miller v. Hurford*, of the right to include taxes paid since the purchase of land at tax sale but for previous years, says, "A mortgagee to protect his security may pay taxes which are a legal charge upon the mortgaged premises." And after citing authorities in support of the foregoing proposition, continues: "The extent to which this rule would apply in favor of a purchaser at tax sale is not now before the court, although no good reason would seem to exist against its application in such case." The act of 1871, however, is not the only provision upon the subject. By section 1 of the act approved February 19, 1875 (sec. 1, art. V, revenue law), it is provided, "That any person, persons, or corporation having by virtue of any provisions of the tax or revenue laws of this state a lien upon any real property for taxes assessed thereon may enforce such lien by an action in the nature of a foreclosure of a mortgage for the sale of so much real estate as may be necessary for that purpose, and costs of suit." By the revenue law then in force taxes were declared to be a perpetual lien on the property. It was in terms provided by section 64 (Gen. Stats., 922), that the owner may redeem within two years, by paying the amount named in the tax certificate, with interest, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale. The various provisions above referred to must be construed together. Our conclusion from them is that plaintiff's title having failed, he is entitled to recover all the taxes for which he has a lien, which will include not only taxes for which the property was sold, and such as were subsequently levied, but also such as were levied for previous years and paid subsequent to the date of his purchase. The judgment of the district court is reversed and the case remanded for an accounting in that court, or if plaintiff

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should elect to have final judgment entered in this court it will be referred here for an accounting.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHARLES T. EDEE V. ALBERT D. STRUNK.

[FILED SEPTEMBER 28, 1892.]

1. **Receivers: LIABILITY FOR ACTS DONE UNDER INVALID APPOINTMENT.** An order by a court, or judge thereof apparently within his jurisdiction, appointing a receiver, which is regular on its face, is *prima facie* valid; and where, in obedience to such order, the receiver collects money and in good faith applies it in discharge of taxes due upon the property named therein and for necessary repairs, such order is a sufficient justification in an action against the receiver to recover the rents collected by him after it has been vacated for want of sufficient notice of the application therefor.
2. ———: ———. Such an order, when apparently valid, is a sufficient defense as to acts done in good faith in obedience to its commands; but if the receiver claims property or other rights as such, he is required to show a valid appointment. The case of *Johnson v. Powers*, 21 Neb., 292, distinguished.

ERROR to the district court for Pawnee county. Tried below before APPELGET, J.

G. M. Humphrey, and H. C. Lindsay, for plaintiff in error:

The order appointing a receiver was void; and money collected thereunder may be recovered by the party entitled to receive it, in an action for money had and received. (*Johnson v. Powers*, 21 Neb., 292.)

A. H. Babcock, and J. K. Goudy, contra:

The prevailing rule is that the process, regular on its face, is sufficient to protect the officer against personal responsibility in serving it; but when he claims property under it, he must show a valid judgment. (*Gidday v. Witherspoon*, 35 Mich., 368; *Beach v. Botsford*, 1 Doug. [Mich.], 199; *Adams v. Hubbard*, 30 Mich., 104.)

Post, J.

This was an action in the district court of Pawnee county in which the plaintiff in error sought to recover from the defendant in error money which the latter had collected as receiver under an appointment alleged to be void. The facts, so far as they are material to a consideration of the question involved, are as follows: Plaintiff in error was the owner of certain property in Pawnee City on which there were liens amounting in the aggregate to more than \$16,000, exclusive of taxes, which amounted to \$251.66. On the 11th day of February, 1889, two of the creditors commenced an action in the district court to foreclose their joint lien. On the 5th day of March, following, the plaintiffs in the foreclosure suit filed a motion for the appointment of a receiver to take charge of the property and collect the rents and profits thereof, on the ground that said property was insufficient security and the mortgagor insolvent. On the 9th day of March said motion was submitted to Hon. J. H. Broady, judge of said court at Beatrice, within the same judicial district, who thereupon made an order in writing appointing the defendant in error, sheriff of Pawnee county, receiver, and directed him to take possession of the property in question, collect the rents thereof, and pay the taxes, keep the buildings insured, etc. This order was filed in the district court of Pawnee county March 13, and the defendant in error, having given bond as directed by the order, took possession of the prop-

erty. On the 29th day of May, following, the said order was set aside and vacated, on the ground that the notice of the application for the appointment of the receiver had not been served on plaintiff in error a sufficient length of time prior to the making of the order. In the meantime defendant in error, while in possession of the property as receiver, had collected rents to the amount of \$251.66. He had also expended for repairs on the property \$25.30, and paid taxes due thereon \$215.90. On the vacation of the order appointing the defendant in error receiver, suit was instituted against him by plaintiff in error to recover the full amount of the rents collected. The only question presented, therefore, is whether the defendant in error should be credited with the amount paid for repairing the property and for the taxes due thereon, since it is not seriously contended that the repairs in question were not necessary or that the taxes were not due and delinquent.

The case of *Johnson v. Powers*, 21 Neb., 292, is relied upon by the plaintiff in error. In that case it is said that under the provisions of section 274 of the Code an order appointing a receiver without the statutory notice is not voidable merely, but void. That case came up on the ruling of the district court on a demurrer to the petition below. In said petition it was alleged that no notice whatever was served on any of the parties interested, and that no bond had been given by the pretended receiver. It does not appear from the petition that any part of the money collected had been disbursed in accordance with the order of the court. It is clear, therefore, that said petition stated a cause of action. This case, however, differs from that in one material respect. Here the receiver is seeking to justify under an order valid on its face. His defense is, that he paid out the money in accordance with the order of the district judge, an order which, as he claims, he was not bound to, and in fact had not the right to call in question. The rule is now well settled that the recital of jurisdictional

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facts in an order appointing a receiver is *prima facie* evidence thereof. (*Potter v. Merchants Bank*, 28 N. Y., 641; *Wright v. Nostrand*, 94 Id., 45; Gluck and Becker on Receivers of Corp., 159, n. 1.) It is true that on a pleading which puts in issue the question of jurisdiction the adverse party may disprove the recitals, not only in an order appointing a receiver, but also in a judgment or decree. Has the plaintiff in error, by his petition, put in issue the question of the jurisdiction of the judge in making the order in question? The only allegation on the subject is the following:

"Third—That the said A. D. Strunk is acting as receiver without any authority of this court or of law whatever; that this plaintiff was not a party to, nor had he any notice of, the appointment of the said A. D. Strunk as receiver, and that all of his acts were null and void, and that his pretended appointment was of no effect whatever."

From the transcript it appears that plaintiff was a party to the foreclosure suit, hence that allegation need not be considered. It will be noticed that it is not alleged that the notice was not in fact served upon him, nor does it appear that he was not present at the hearing of the motion in person or by counsel. It does appear that eleven of the defendants appeared by counsel, but the record does not disclose who of them thus appeared. The petition, in our judgment, is wanting in the allegations essential to put in issue the question of the jurisdiction of the order. We do not, however, base our conclusion alone upon that ground, but also upon the ground that the order, being *prima facie* regular and valid, is a sufficient justification. We can see no reason on authority, and certainly none on principle, why the rule which is interposed for the protection of ministerial officers should not be equally available to the defendant in error. A sheriff, according to the prevailing authorities, will be justified by a process regular and valid on its face (*Gidday v. Witherspoon*, 35 Mich., 368; *Adams v. Hubbard*,

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30 Id., 104; *Newburg v. Munshower*, 29 O. St., 617; *Cornell v. Barnes*, 7 Hill [N. Y.], 35; Crocker on Sheriffs, secs. 284, 286), although, should he claim property under it, he is required to show a valid writ. The defendant in error is making no claim to the money which came into his hands in obeying the order in question; nor has the plaintiff suffered any loss. The money in controversy has been expended for his benefit. It appears to us that the reasons for the rule exempting a sheriff from liability in the cases cited above should apply with especial force in cases like this. The receiver holds his office by appointment direct from the court or judge and, when valid, he becomes an officer of the court, subject to its orders and liable for a disobedience thereof. It is his right and duty in certain cases to apply to the court for advice, and we think the policy of the law is not to require him to obey the judgment of the court or order of the judge at his peril. *Johnson v. Powers, supra*, was correctly decided upon the record; but as authority must be restricted to cases within the facts of that case, we do not find any error in the record, and the finding and judgment of the district court for \$10.46, the balance in the hands of the defendant in error, is

AFFIRMED.

THE other judges concur.

C. S. WORLEY V. SAMUEL SHONG.

[FILED SEPTEMBER 28, 1892.]

1. **Appeal: CONCLUSIVENESS OF RECORD.** In all appellate proceedings the records of the trial court, when properly verified, import absolute verity.
2. **Diminution of Record: RULE TO CORRECT JUSTICE'S JOURNAL ENTRY ON HIS DOCKET NOT ALLOWED.** On the suggestion

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of a diminution of the record, if it appears that any material part of the record has been omitted, the court will, by rule, require such record to be supplied; but a rule will not be allowed to require a justice of the peace to correct a journal entry on his docket.

3. **Justice of the Peace: JURY TRIAL: TIME OF ENTERING JUDGMENT ON VERDICT.** In a trial to a jury before a justice of the peace a verdict was returned and filed at twenty-five minutes after 8 o'clock P. M., but judgment was not entered thereon until the next day. *Held*, That the judgment was not entered immediately within the meaning of section 1002 of the Code, and that the justice had lost jurisdiction at the time the entry of judgment was made.

ERROR to the district court for Box Butte county. Tried below before KINKAID, J.

W. M. Iodence, for plaintiff in error.

C. W. Gilman, and *B. F. Gilman*, *contra*.

Post, J.

The plaintiff in error sued the defendant in error before a justice of the peace of Box Butte county. The cause was tried to a jury, resulting in a verdict for the plaintiff. From the transcript of the justice it appears that the verdict was returned and filed at 8 o'clock and 25 minutes P. M. February 4, 1890, but that judgment was not entered thereon until the next day. Defendant in error filed a petition in error in the district court of said county, by which he sought to reverse said judgment, on the ground that it was not entered immediately upon the returning of the verdict, as provided by section 1002 of the Code. In the district court he filed an affidavit to the effect that the justice did, in fact, enter judgment on the day the verdict was returned and immediately thereafter, and so entered it on his docket, but had subsequently altered the entry so as to show that it was not entered until the following day. Upon this showing he suggested a diminution of the record and moved for an

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order requiring the justice to certify accordingly. This motion was overruled, to which exception was taken. The district court did not err in overruling the motion aforesaid. In all appellate proceedings the record of the trial court, when properly prepared and verified, imports absolute verity. (Elliott on Appellate Proceedings, 186.) It is one thing to amend the transcript and quite a different thing to change the record. (Id., 190.)

The rule is well settled, both in appeals and proceedings in error, that this suggestion will be entertained and the rule allowed only when it is made to appear that there is an additional record in the trial court; in short, that some part of the record has been omitted. For the purpose of the petition in error the district court rightly held that the transcript of the justice, duly certified, could not be impeached. The district court, having refused to allow an order for the correction of the record by the justice of the peace, entered judgment reversing the judgment for plaintiff. The court evidently followed *Thompson v. Church*, 13 Neb., 287, and *Austin v. Brock*, 16 Id., 642, in holding that the judgment was not entered "immediately" upon the finding and return of the verdict within the meaning of section 1002 of the Code. This case is clearly within the rule announced in the above cases. It may be that a more liberal construction would have been in harmony with the spirit of the Code, but having been the recognized rule in this court for many years, it will be adhered to until changed by the legislature. We are of the opinion that the justice of the peace had lost jurisdiction at the time the entry of judgment was made. The judgment of the district court is right and should be

AFFIRMED.

THE other judges concur.

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**SAMUEL STRATTON, APPELLEE, v. FRANCIS E. REIS-
DORPH ET AL., APPELLANTS, IMPLEADED WITH
OMAHA LUMBER COMPANY, APPELLEE.**

[FILED SEPTEMBER 28, 1892.]

1. **Mortgage Foreclosure: NOTICE OF SALE.** In a notice of sale of real estate under a decree of foreclosure, while it is proper to state the amount of the decree, such statement is not essential to the validity of the notice.
 2. ———: **PARTIES.** In a foreclosure proceeding the holder of a prior mortgage is not a necessary party.
 3. ———: **FINDINGS: PRIOR INCUMBRANCES.** In a foreclosure proceeding, where the holder of a prior mortgage is not made a party, it is not necessary for the court to find the amount due on such mortgage, since the holder, not being a party to the suit, will not be concluded thereby; and the provisions of the Code for the ascertainment of prior liens by the appraisers are adequate to preserve the rights of the mortgagor or others standing in the same relation to the mortgaged property.
 4. ———: **CONFIRMATION: IRREGULARITIES IN DECREE.** Where parties have been personally served with summons and make an appearance in a suit to foreclose a mortgage, they cannot afterward, to defeat confirmation, assail the decree for a mere irregularity.
- **APPEAL** from the district court for Saunders county.
Heard below before MARSHALL, J.

David Van Etten, and O. C. Tarpenning, for appellants.

T. B. Wilson, and Reese & Gilkeson, for appellee Stratton.

Post, J.

This is an appeal from an order of the district court of Saunders county confirming the sale of certain real estate, under an order of sale issued upon a decree of foreclosure. The appellants, who were defendants below, filed answer

in the district court, but a demurrer thereto was sustained. To this ruling appellant took no exception and pleaded no further. An order of sale was issued April 23, 1890, under which the sheriff sold the land, making his return June 3, following, on which day the preliminary order to show cause against the confirmation of sale was made. On the 4th day of June certain objections and exceptions to the sale were filed, and on the next day the order of confirmation was entered. From this order defendants appeal.

The first objection is, that the notice of sale is insufficient because it does not state the amount of the decree, nor any amount. An examination of the notice, as published, shows that it complies with all of the provisions of statute. There is no requirement that the notice shall contain a statement of the amount found due by the decree. That is a matter of public record. The notice refers to the decree and the order of sale. This is sufficient.

The next contention is, that the sheriff had no authority to sell subject to the mortgage of the Lombard Investment Company, inasmuch as there was no finding of the amount due thereon. This is, in effect, an attack upon the decree, as it is therein found that the Lombard Investment Company has a prior lien and an order is awarded for the sale of the property subject to said mortgage. The investment company was not a necessary party to the suit. (*White v. Bartlett*, 14 Neb., 320.) The district court had jurisdiction of the subject of the action and of the parties, hence questions which affect the regularity of the decree are concluded thereby. The decree cannot be assailed for any mere irregularity upon a motion to set aside a sale. (*Parrat v. Neligh*, 7 Neb., 456; *State Bank v. Scofield*, 9 Id., 499.) But the decree is not irregular. The Lombard Investment Company, not being a party to the foreclosure proceeding, would not have been bound by any finding as to the amount due on its mortgage. Nor can the failure to find the amount due on a prior mortgage in such case prejudice the mort-

Stratton v. Reisdorph.

gagor or other party standing in the same relation to the mortgaged property. The provisions of the Code for the appraisement of property sold on execution or at judicial sale, sections 491a, 491b, 491c, 491d, are adequate for his protection. Under these provisions the appraisers are required to find the amount of prior liens from the best evidence obtainable, viz., the records of the county clerk, the clerk of the district court, and the county treasurer. They act judicially, and should specifically enumerate the liens and incumbrances which they find against the property. (*Sessions v. Irwin*, 8 Neb., 5.)

The question not being an open one in this state, we do not deem it necessary to examine the cases cited by counsel for defendants. The sum deducted on account of the prior mortgage, \$900, is the amount found by the appraisers; and as no attempt was made to impeach their finding, it must be presumed to be correct.

Other objections in the defendants' brief do not call for discussion, since they are not predicated upon any state of facts which appear of record. In fact, so far as they are to be regarded as statements of fact, they are direct contradictions of the record. The proceedings in the district court appear to have been in all respects regular, and the order confirming the sale is

AFFIRMED.

THE other judges concur.

JOHN FITZGERALD ET AL., ADMINISTRATORS, V. SIMON
P. BENADOM.35 317
45 48

[FILED SEPTEMBER 28, 1892.]

1. Record for Review: BILL OF EXCEPTIONS: AFFIDAVITS.

Where issues of fact are tried on affidavits, this court will not review the order of the district court upon such evidence, unless the affidavits are identified and preserved in the form of a bill of exceptions.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

James E. Philpott, for plaintiffs in error.

Abbott, Selleck & Lane, contra.

POST, J.

Defendant in error recovered judgment against John Sheedy in the district court of Lancaster county, for \$40.87 and costs. Defendant below subsequently filed a petition in error in this court for the purpose of having said judgment reviewed. On suggestion of his death since the filing of the petition in error, the action was revived in the name of the administrators of his estate, S. M. Melick and John Fitzgerald. The action was originally commenced before a justice of the peace and brought into the district court by appeal. A motion was made in the district court to strike out the petition, for the reason that the cause of action stated therein was not the same as that tried before the justice. This motion was overruled, to which exception was taken, and is the error assigned in this court. The record does not contain any of the proceedings before the justice. The only evidence as to the issues at that time is the affidavits of counsel. The question as to what issues

 Carr v. Luscher.

were submitted to the justice of the peace is, therefore, one of fact. The district court appears to have found for the plaintiff below upon that question, and evidently determined that the cause of action before the justice was substantially the same as that stated in the petition. This ruling we cannot review, since the evidence submitted to the district court upon the hearing of the motion has not been preserved. It has been often held that where issues of fact are tried in the district court upon affidavits, such evidence must be preserved in the form of a bill of exceptions in order to enable this court to review the judgment or order complained of. This rule is so well settled that it is needless to cite the cases in point. The judgment of the district court is

AFFIRMED.

THE other judges concur.

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| 35 | 318 |
| 40 | 717 |
| 85 | 317 |
| 42 | 842 |

THOMAS CARR V. EDWARD M. LUSCHER.

[FILED OCTOBER 5, 1892.]

1. **Appeal from Justice's Court: TRIAL: ISSUES.** Under the decision of this court in *Cleghorn v. Waterman*, 16 Neb., 226, which has been followed ever since, a defendant who has appeared in an action before a justice of the peace may appeal from the judgment, notwithstanding he was not present at the trial. On the trial of such a case, in an ordinary action, it will be assumed that the cause of action is denied, and it will devolve on the plaintiff to prove the same; and in case the defendant appeals, his defense will be restricted to a like denial.
2. ———: **PLEADING: COUNTER-CLAIM.** Motion to strike out counter-claim *held* properly sustained.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

Wooley & Gibson, for plaintiff in error:

The plaintiff in error appeared as defendant in justice's court and was entitled to appeal. The issues can be made up in the appellate court, and the trial court erred in sustaining the motion of plaintiff below to strike out that portion of the amended answer setting up a counter-claim. (*Smith v. Borden*, 22 Neb., 488; *Andrews v. Mullin*, 14 Id., 248; *Sanchez v. Candelaria*, 23 Pac. Rep. [N. M.], 239; *Wagner v. Evers*, 20 Neb., 183; Code Civil Procedure, secs. 951, 1010.)

T. C. Munger, contra:

The same issues must be tried on appeal that were tried in the court below. (*Baier v. Humpall*, 16 Neb., 128; *Courtney v. Price*, 12 Id., 192; *O'Leary v. Iskey*, Id., 137; *Fuller v. Schroeder*, 20 Id., 636; *Sawyer v. Brown*, 17 Id., 172; *U. P. R. Co. v. Ogilvy*, 18 Id., 638; *Sells v. Haggard*, 21 Id., 361; *Clendenning v. Crawford*, 7 Id., 476; *Cain v. Harden*, 1 Ore., 360; *Marx v. Trussell*, 50 Miss., 498.) A counter-claim is a separate cause, and if not presented below cannot be appealed. (*Burbage v. Squires*, 3 Met. [Ky.], 77; *Cross v. Eaton*, 48 Mich., 184; *Wilson v. Wilson*, 30 O. St., 372; *Grant v. Ludlow*, 8 Id., 32; *Maxwell's Justice Pr.*, 169; *Callahan v. Newell*, 61 Miss., 437.)

MAXWELL, CH. J.

The defendant in error brought an action against the plaintiff in error before a justice of the peace to recover the sum of \$63.25. A summons was duly issued and served, which was returnable June 30, 1890, at 9 o'clock A. M. At the time to which the cause was continued the plaintiff in error failed to appear and judgment was rendered against him for the sum of \$63.25 and costs. He then appealed the cause to the district court and in that court

Carr v. Luscher.

filed an answer to the petition of the defendant in error as follows:

"Comes now the above named defendant and for amended answer to the plaintiff's petition admits that he employed the plaintiff as a traveling salesman, and agreed to pay him the sum of twenty-five cents per box for soap sold by him, but denies that defendant agreed to pay any traveling or other expenses whatever.

"Further answering, the defendant alleges that he advanced and paid to plaintiff the sum of \$75, which was about \$13 more than was due plaintiff, and defendant is not indebted to plaintiff in any sum whatever.

"Further answering by way of counter-claim, defendant alleges that while plaintiff was so employed by defendant, as hereinbefore stated, the plaintiff, without defendant's knowledge or consent, falsely represented the quality of defendant's stock and promised defendant's customers to fill orders in violations of defendant's instructions, whereby defendant lost his customers in the territory traveled by plaintiff, to defendant's damage in the sum of \$200.

"Wherefore defendant prays judgment against the plaintiff in the sum of \$200 and costs of suit."

The defendant in error thereupon moved to strike out of the defendant's amended answer filed May 4, 1891, beginning "further answering, defendant alleges that he advanced and paid to plaintiff," and ending "wherefore defendant prays judgment against the plaintiff in the sum of \$200 and costs of suit," and all words included between said clauses, being all after the words "or other expenses whatever," for the reason that the issues in the court below, where this cause was tried and from which it was appealed, did not include the matters set up in the said words of the amended answer, nor was the trial upon the said matter so set forth, and the issues by the amended answer are not the issues in the court below.

The motion was sustained as to the claim for damages

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and overruled as to payment. The defendant in error thereupon filed a reply denying payment. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$65.48, upon which judgment was rendered.

The defendant below (plaintiff in error) brings the cause into this court, and the only question presented is the ruling of the court in striking out of the answer the counter-claim for damages.

The plaintiff in error relies upon *Smith v. Borden*, 22 Neb., 487-8, to sustain his position. In that case, however, the defendant did not set up a counter-claim or set-off, and the only question presented was the liability of the defendant to the plaintiff. The court felt constrained in view of the decision of a majority of the court in *Cleghorn v. Waterman*, 16 Neb., 226, to hold that an appeal would lie where there had been an appearance. That case was followed by *Crippen v. Church*, 17 Neb., 304. These cases are a wide departure from *Clendenning v. Crawford*, 7 Neb., 474, in which it was held that the party appealing must have contested the case before the justice. The court, as at present constituted, view the last case cited with favor and regard it as a correct statement of the law, but as it is desirable to adhere to a practice when once established, we will follow the later decisions. We will not extend the rule, however.

A defendant, by failing to appear at the trial before the justice, cannot thereby obtain an advantage. He cannot refuse there to present his claim, set-off, or counter-claim, and on an appeal plead and prove the same. From the nature of the case before the justice, the issue is the right of the plaintiff to recover on his claim. For the purpose of the trial the claim is treated as denied, and it devolves on the plaintiff to prove the same; and on appeal the same issue is presented. The court did not err, therefore, in striking out the alleged defense of the defendant below,

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and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CLARKE GAPEN, V.
A. B. SOMERS.

[FILED OCTOBER 5, 1892.]

1. **Cities of Metropolitan Class: COMMISSIONER OF HEALTH: AUTHORITY OF MAYOR TO REMOVE.** A commissioner of health for a city of the metropolitan class is to be appointed by the mayor and approved by the council, and "shall hold office for a term of two years, * * * unless sooner removed." In 1889 the statute was amended so as to read "All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office and until their successors are appointed and qualified, unless sooner removed or the ordinance creating the office shall be repealed, except as otherwise provided in section 104," and in 1891 the statute was amended to provide that the mayor, on the second Tuesday in January after his election, is required to appoint certain officers, which provision seems to include the commissioner of health. *Held*, Construing these provisions together, that the mayor had authority at the time stated to remove the commissioner, without having made charges, and appoint one in his place.
2. ———: ———: ———. Where the statute authorizing the appointment contains a reservation of the right of removal without preferring charges, and this power is exercised by the removal of the incumbent and the appointment of another in his stead, the right of the former to the office will cease.
3. ———: ———: **TERM OF OFFICE: POWER TO REMOVE RETAINED: PREFERRING CHARGES NOT NECESSARY.** Where a person is appointed to an office for a definite period and there is a provision that to obtain his removal charges must be preferred against him, he cannot be removed unless such charges

State, ex rel. Gapen, v. Somers.

are made; but this rule does not apply to a case where the power of removal is retained and no charges are required.

4. ———: ———: LAW GOVERNING REMOVAL OF OFFICERS FOR FIXED TERM DOES NOT APPLY. Section 172 of the act in relation to metropolitan cities does not apply to the officers of the class last named.

ORIGINAL proceeding in nature of *quo warranto*.

William D. Beckett, and *Gurley & Marple*, for relator.

W. J. Connell, contra.

MAXWELL, CH. J.

This action is brought by the relator to oust the defendant from the office of commissioner of health for the city of Omaha and to install the relator therein. The relator was appointed to the office on the 28th of April, 1891.

It appears from the record that at the election for mayor of said city in the fall of 1891 George P. Bemis was elected mayor thereof and entered upon the duties of said office on the 5th day of January, 1892; the mayor removed the relator from said office and appointed the defendant to the position, who thereupon entered upon the duties of his office and has ever since exercised the same.

It is claimed on behalf of the relator that the mayor does not possess the power to remove the commissioner of health, and that therefore his action in the premises is unauthorized and void. Section 30, chapter 12a, Compiled Statutes, relating to cities of the metropolitan class, so far as it applies to the appointment of commissioner, is as follows: "Said commissioner of health shall be appointed by the mayor, subject to the approval of a majority of the council; shall hold office for a term of two years from date of appointment, unless sooner removed or retired."

Section 104 provides for a board of public works "which shall consist of three members, residents of such city, to be appointed by the mayor by and with the consent of the

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council before the first Monday of July, 1887, for the term of one, two, and three years respectively, the term of office of each to be designated by the mayor; and annually thereafter there shall be appointed, as hereinbefore provided, one member, whose term of office shall be three years."

The statute also provides for removing any of such officers by the city council upon charges being preferred, the party accused to be served with a copy.

Section 143, as amended in 1891, is as follows: "Upon the second Tuesday after the election in 1887, and on the second Tuesday in January after each general city election, the mayor, subject to confirmation by the city council, shall appoint the following officers, to-wit: A city engineer, a city attorney, an assistant city attorney, a city prosecutor, a street commissioner, an inspector of buildings, a boiler inspector, and such other appointive officers as may be authorized herein or specially provided for by ordinance. It shall require a majority of all the members of the council to confirm each of said appointments. Upon the failure or refusal of the council to confirm any of said appointments, it shall be the duty of the mayor, on the first Tuesday of each month thereafter, to make other appointments for such offices if the appointees thereto be not confirmed, and to so continue until approved by the council."

Section 144 provides: "All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office and until their successors are appointed and qualified, unless sooner removed, or the ordinance creating the office shall be repealed, except as otherwise provided in section 104."

We find no reference to sections 143 and 144 in the brief of the attorneys for the relator. One of these sections was amended in 1889 and the other at the last session of the legislature.

State, ex rel. Gapen, v. Somers.

An examination of the several sections of the act shows that certain officers, like the board of public works, consisting of three members, are appointed for one, two, and three years, and there is a provision for filing specific charges against each of the members of such board and removing the person adjudged to be guilty. Where an office is held in that way, there can be no removal except for cause. Where, however, the right of removal is reserved in the appointing power without the necessity of making charges, it may be exercised in the discretion of the appointing power, even before the expiration of the term. This principle is recognized in *State, ex rel. Carter, v. Board of Public Lands and Buildings*, 7 Neb., 42.

Sections 143 and 144, above copied, relate alone to officers whose terms expire with that of the mayor or those removable at pleasure without preferring charges.

In the late case of *State v. Smith*, 35 Neb., 13, the parties held for a definite period which had not elapsed, and there was a provision that in order to remove any of the members of the board it was necessary to prefer charges against them, and it was held that a removal of such officers without such charges having been made was unauthorized. That, we think, is a correct statement of the law; but it does not apply to this case, as the right of removal is impliedly retained in the hands of the mayor. We are referred to section 172, which is as follows: "The power to remove from his office the mayor or any councilman or other officer mentioned in this act in any city of the metropolitan class, for good and sufficient cause, is hereby conferred upon the district court for the county in which such city is situated, and whenever any two of the city councilmen shall make and file with the clerk of said court the proper charges and specifications against the mayor, alleging and showing that he is guilty of malfeasance or misfeasance as such officer, or that he is incompetent or neglects any of his duties as mayor, or that for any

State, ex rel. Gapen, v. Somers.

other good and sufficient cause stated he should be removed from his office as mayor, or whenever the mayor shall make and file with the clerk of said court the proper charges and specifications against any councilman or other officer mentioned in this act, alleging and showing that he is guilty of malfeasance or misfeasance in such office, or that he is incompetent, or neglects any of his duties, or that for any other good and sufficient cause stated he should be removed from his office, the judge of such court may issue the proper writ requiring such officer to appear before him, on a day therein named, not more than ten days after the service of such writ, together with a copy of such charges and specifications upon such officer, to show cause why he should not be removed from his office. The proceedings in such case shall take precedence of all civil causes and be conducted according to the rules of such court in such cases made and provided, and such officer may be suspended from the duties of his office during the pendency of such proceedings by order of said court."

This section applies to those officers who hold for definite terms and can be removed only by proceedings against them. As to several of such officers its provisions are cumulative, that is, provides an additional tribunal for the determination of the rights of the parties, but does not include cases of the kind here involved. The writ must be denied and the action

DISMISSED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. C. J. ELLIOTT, V. C. T.
HOLLIDAY.

[FILED OCTOBER 5, 1892.]

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| 35 | 327 |
| 40 | 721 |
| 35 | 327 |
| 46 | 190 |
| 35 | 327 |
| 53 | 543 |

1. **Judicial Sales: DUTIES OF OFFICERS CONDUCTING: COURT TO SUPERVISE.** In selling real estate under mortgage foreclosure the court may appoint a master commissioner or the sheriff to conduct the sale. It is the duty of the officer thus appointed to conduct all the proceedings leading up to and the sale itself in a fair, impartial manner so that the property may be sold for the best price possible. This officer is under the control of the court, and it is its duty to see that the advertisement of sale is published in a paper that will give it general publicity so as to invite competition, and that the sale in other respects is fairly conducted.
2. ———: **SUPREME COURT MAY REVIEW BUT NOT DIRECT PROCEEDINGS BY MANDAMUS.** If the trial court errs in any of its proceedings, its action may be reviewed in the supreme court; but this court will not by *mandamus* direct the officer making the sale to advertise the same in any particular newspaper.

ORIGINAL application for *mandamus*.*C. J. Elliott, and Sullivan & Gutterson, for relator.*

An executive officer may be required to perform ministerial or executive duty, though party interested may have a remedy at law against him for failure to do so. (*Fremont v. Crippen*, 10 Cal., 211; *People v. McClay*, 2 Neb., 7; *Williams v. Smith*, 6 Cal., 91; *People v. Fleming*, 4 Denio [N. Y.], 137.)

Hutchinson & Dickinson, and Campbell & Dean, contra:

Until it is made to appear that application was first made to court entering decree, or that the latter court is powerless to enforce its decree, *mandamus* will not issue from this court. (*State v. Fillmore Co.*, 32 Neb., 870; *State v. Moores*, 29 Id., 122; *Pickell v. Owen*, 24 N. W. Rep. [Ia.], 8.)

MAXWELL, CH. J.

This is an action for a peremptory writ of *mandamus* to compel the defendant, who is sheriff of Custer county, to advertise sales of real estate under foreclosure of mortgages in certain newspapers.

It is alleged in the petition "That the relator, who is an attorney at law in regular practice in the courts of Nebraska, did, on the 24th day of October, 1891, the same being one of the regular days of the October, 1891, term of the district court of Custer county, Nebraska, as attorney for the plaintiff therein, obtain a decree of foreclosure in said district court in a certain cause there and then pending in said court, wherein the American Freehold Land Mortgage Company, of London, was plaintiff, and George W. Losey was defendant, wherein said court found that there was due to the plaintiff the sum of \$753.14, with interest at the rate of eight per cent per annum from the 20th day of October, 1891, which constituted a first lien on the mortgaged premises described in the petition in said cause, viz., the southeast quarter of section 23, township 17 north, range 20 west, 6th P. M.; and that unless said defendant pay said amount so found due within twenty days after the rendition of said decree, that said mortgaged premises be sold as upon execution to satisfy said decree.

"That more than twenty days, viz., about eighty days, elapsed after the rendition of said decree, and the said defendant had not paid the amount so found due, nor any part thereof, nor had there been filed in said cause any request for stay of sale. Whereupon relator filed with the district clerk of said Custer county, Nebraska, a *præcipe* for order of sale in said cause, which was duly issued under the seal of said court, a copy of which said order of sale is hereto attached, marked 'Exhibit A,' and prayed to be taken as a part hereof; that upon the receipt of said order of sale he at once prepared the notice of sale required by

State, ex rel. Elliott, v. Holliday.

the statute and caused the same to be inserted for publication in the *Custer Leader*, a newspaper of general circulation in said Custer county, Nebraska, which said newspaper is printed and published at Broken Bow, in said county, and within about three miles of the land described in said order of sale and notice, and which said newspaper has a circulation equal to, if not larger, than any other newspaper published in said county; that as soon as relator was able to find the defendant herein, viz., on the first day of March, 1892, who was and still is the sheriff of said Custer county, he tendered to said defendant said order of sale, together with the certificate of liens and incumbrances as shown by the records of the district clerk's office, and a copy of the notice of sale hereinbefore referred to, upon which was the certificate of the publisher of said *Custer Leader*, that said notice had been duly inserted in said paper on the 18th day of February, 1892, to be published for five consecutive weeks, and that the fees for the publication had been fully paid by the plaintiff, a copy of which said certificate is hereto attached, also copy of notice, and marked 'Exhibit B,' and prayed to be taken as a part hereof. At the same time relator tendered to said defendant, in current money of the United States, the sum of \$7.75 as advance sheriff's fees as follows, viz.:

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| For making levy..... | \$0 50 |
| Calling appraisers..... | 50 |
| Swearing appraisers..... | 50 |
| Fees of appraisers..... | 1 00 |
| Copy of appraisal..... | 25 |
| Advertising sale..... | 50 |
| Mileage, five miles..... | 50 |
| County treasurer's certificate of tax liens..... | 2 00 |
| County clerk's certificate of liens and incumbrance, | 2 00 |

and demanded said defendant to proceed to appraise and sell said property in accordance with said order of sale and notice. And relator avers that said defendant then and

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there absolutely refused to accept said order of sale, or to proceed to appraise the property described therein, or to sell, or to take any action whatever in the matter, unless relator would then and there pay him, in addition to the amount already tendered, the further sum of \$5 as a publication fee, for a new notice of sale to be by him inserted in some other newspaper to be selected by him; that afterwards, on the 2d day of March, 1892, he renewed the tender above referred to, and tendered to said defendant in addition thereto the further sum of \$3 for a new notice to be published in the *Custer Leader* selected by relator, or in some other paper that would publish the same for \$3, if the said defendant was of the opinion that he could not legally proceed to sell under the notice already inserted by the relator, and the said defendant absolutely refused to accept said tender and publish the notice of sale in said *Custer Leader*, as requested by said relator, or in any other paper for the sum of \$3; that while the said sheriff of Custer county had regularly taxed as costs on orders of sale the sum of \$5 publication fee, yet the majority of publishers of newspapers in said Custer county only charge and are willing to contract for the publication of said sale notices, in the manner and for the time required by law, for the sum of \$3 each, which is the amount charged by the *Custer Leader* for the notice so inserted by relator, as hereinabove set forth; that all of the newspapers published in said Custer county, except those published in the interests of a certain political party, known as the independent or people's party, have in the past and are now willing to publish the notice herein described, and all others of the same kind, for the sum of \$3; that said defendant was elected by and belongs to the said independent or people's party; that the newspapers published in the interests of said party demand the sum of \$5 for publishing said notice, and refuse to publish the same for a less sum, and said defendant insists on having all notices

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of the above description published in said papers so demanding therefor the sum of \$5 aforesaid, thereby compelling the plaintiff's clients to pay the sum of \$2 in each case as tribute to his said party; that the majority of the said newspapers of said independent party, in which said defendant proposes to publish said sale notices, are papers published in rural towns, remote from the county seat of Custer county, and of such small circulation as in effect to utterly defeat the object of the law requiring the greatest possible publicity to be given of the time and place of such sales."

To this the defendant has filed a general demurrer.

No copy of the notice is set out in the petition, but it is alleged that the relator published the same without consulting the sheriff, and in fact without his knowledge, so far as appears, and this court is asked to approve of such practice by compelling the officer to accept the notice as his own. It is true that it is alleged that the officer will insert the notice in some newspaper other than the one selected by the attorney, and for advertising which a higher price will be paid than in the paper selected by the relator. For the purpose of the demurrer this is conceded to be true, and also that the officer may advertise in an obscure paper; still the remedy for these wrongs is not by *mandamus* from this court.

Section 852 of the Code provides that "All sales of mortgaged premises under a decree in chancery shall be made by a sheriff, or some other person authorized by the court, in the county where the premises or some part of them are situated; and in all cases where the sheriff shall make such sale he shall act in his official capacity, and he shall be liable on his official bond for all his acts therein, and shall receive the same compensation as is provided by law for like services upon sales under execution."

Section 451 provides: "Real property may be conveyed by master commissioners as hereinafter provided: First—

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When, by an order or judgment in an action or proceeding, a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment. Second—When specific real property is required to be sold under an order or judgment of the court.”

Section 452 provides: “A sheriff may act as a master commissioner under the second subdivision of the preceding section. Sales made under the same shall conform in all respects to the law regulating sales of land upon execution.”

Section 453 provides: “The deed of a master commissioner shall contain the like recital, and shall be executed, acknowledged, and recorded as the deed of a sheriff of real property sold under execution.”

It will thus be seen that, while a sheriff may sell real estate under a mortgage foreclosure, and as he has given bond for his official acts and is presumed to be familiar with the duties, he is usually appointed for that purpose or permitted to conduct the sale. The court, however, may appoint another to perform that duty.

The court is presumed to act impartially and for the best interests of both the creditor and debtor. The creditor is entitled to have his mortgage satisfied, the debtor also has rights in the premises, and is entitled to a fair appraisal of his property, and the property must, under the Code, sell for at least two-thirds of the net cash value so ascertained. The officer making the sale, whether he be sheriff or a master commissioner appointed by the court, is so far under its orders as to be answerable to it for any abuse of his powers or violation of his duty, and, no doubt, the court, upon the proper application, and being convinced that there was danger of an abuse of power on his part, may remove him and appoint another in his place. Neither the court itself, nor any of its officers, has any right to show partiality or unfairness in the performance of his functions, and it is the duty of the court to see that its officers do not give cause for suspicion of wrong. The

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object of advertising property for sale is in order that publicity may be given to the sale and competition invited. Legal advertisements should not be inserted in an obscure paper where the probabilities are that they will be seen by but few, where there is a paper of general circulation in the county, because the object of the law will be in part at least defeated. To preserve impartiality and fairness the officer should not be under the direction or control of either party. Under the statute the plaintiff may become the purchaser of the estate; and while it is true that the sum bid must equal two-thirds of the net appraisement, still, if he could control the officer, there is danger that the appraisement would be fixed at much less than the true value. It is a power liable to abuse and should be jealously guarded by the courts.

The plaintiff, or his attorney, may, in a proper case, order an execution or order of sale to be issued and delivered to the officer, but neither can control the performance of his duty. These matters are almost wholly under the control of the trial court in the first instance at least. If an error is committed by that court or an abuse of discretion to the prejudice of one of the parties, the action complained of may be reviewed in this court in some of the modes provided by law. The trial court has jurisdiction of the subject-matter and the parties. Both are directly under its control and supervision, and this supervision should not be interrupted by proceedings by *mandamus* in this court. If the court should exercise jurisdiction in such case it would lead to endless confusion. So far as appears, no application has been made to the district court, and it has had no opportunity to act in the premises.

The petition fails to state a cause of action. The demurrer is therefore sustained, and as it is apparent that the relator is not entitled to a *mandamus*, the action is

DISMISSED.

THE other judges concur.

MARIA HELLMAN, EXECUTRIX, v. EVA OLIVER.

[FILED OCTOBER 5, 1892.]

1. **Landlord and Tenant: ACTION FOR RENT: ESTOPPEL.** In an action upon a lease to recover rent, the defendant alleged that the building was leased for an unlawful purpose, naming it, to which the plaintiff replied that the same defense had been interposed to an action upon other installments of rent, and overruled. *Held*, That the proof failed to establish an estoppel.
2. ———: **LEASING PREMISES FOR UNLAWFUL PURPOSE: INSTRUCTIONS.** Where the defense to an action for rent was that the building was leased by the plaintiff for an unlawful purpose, which was stated, an instruction to the jury, in substance, that they may determine if the house was to be "used for such unlawful purpose," "or other unlawful purposes," is erroneous.
3. ———: ———: **PLEADING.** The unlawful purpose which it is claimed renders the contract illegal and void must be pleaded, and unless so pleaded, should not be submitted to the jury.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Chas. E. Clapp, for plaintiff in error:

The adjudication on merits of defense that premises were leased for unlawful purposes, had in the former action on the same lease, is a bar to maintenance of that defense in this case. (*Danziger v. Williams*, 91 Pa. St., 234; *Hanna v. Read*, 102 Ill., 596; *Guest v. Brooklyn*, 79 N. Y., 624; *Betts v. Starr*, 5 Conn., 550; *Spencer v. Dearsth*, 43 Vt., 98; *Babcock v. Camp*, 12 O. St., 11; *Foster v. Konkright*, 70 Ind., 123; *Beloit v. Morgan*, 7 Wall. [U. S.], 619; *Davis v. Brown*, 4 Otto [U. S.], 423.)

Gannon & Donovan, contra:

Matter cannot be proved to have been passed upon, except it be such as might have been given in evidence under

Hellman v. Oliver.

the issue joined. (Freeman, Judgments, 313; *Briggs v. Wells*, 12 Barb. [N. Y.], 567; *Knickerbocker v. Beam*, 42 Kan., 17; *Cromwell v. County*, 94 U. S., 353; *Davis v. Brown*, Id., 423; *Russell v. Place*, Id., 606.)

MAXWELL, CH. J.

This action was brought by the plaintiff to recover rent for a certain dwelling house from the 9th day of June, 1888, to the 9th day of May, 1889, at \$125 per month.

The defendant in her answer admits the execution of the lease, but alleges that it terminated on the 9th of October, 1888, at which time she surrendered possession. She also alleges, in substance, that it was agreed between the parties that the place was to be kept as a house of assignation, and that it was agreed that in case the house was closed by the public authorities before the expiration of the written lease, the defendant should thereupon surrender the possession and the lease should cease and determine; and that the public authorities closed the house on the 9th of October, 1888.

In the reply the plaintiff denies the facts stated in the answer and alleges that the same facts were put in issue in the defendant's answer for another installment of rent accruing upon the same lease, and the defendant is therefore estopped to set the same up in this case.

On the trial of the cause the jury found in favor of the defendant, and a motion for a new trial having been overruled, judgment was entered dismissing the action.

It is unnecessary to set out the answer pleaded as an estoppel. In our view it is not sufficient for that purpose and was not a bar to the defense interposed by the defendant in this action.

The court at the request of the defendant gave the following instruction:

"You are instructed that although it may be expressly provided in the lease that the premises should not be used

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for some particular unlawful purpose, still, if the intention of the parties to the same was that they might be used for such unlawful purposes, or other unlawful purposes, the said lease is an illegal contract and the plaintiff cannot recover upon it; and if you find that it was the intention and understanding of both parties hereto that the premises would be used for such unlawful and immoral purpose, then your verdict must be for the defendant."

In this we think the court erred. The answer of the defendant alleges a single unlawful purpose, which is designated. The proof was directed to that point, and the jury should have been restricted to the question presented. To instruct the jury that they might consider "other unlawful purposes" not put in issue, left them at liberty to consider any matter which they may have deemed unlawful. Under the Code the facts constituting the alleged illegality which renders the contract invalid must be pleaded and the proof will be restricted to proving or disproving such facts; otherwise it might be impossible to defend against a general charge of unlawful purposes.

There are errors also in the instructions given by the court on its own motion, but, as no exceptions seem to have been taken, they cannot be considered. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

NELLIE A. FIGLEY V. J. F. BRADSHAW ET AL., AP-
PELLEES, IMPLEADED WITH GOODRICH BROS.
BANKING COMPANY, APPELLANT.

[FILED OCTOBER 5, 1892.]

1. **Mortgages: PRINCIPAL AND AGENT.** A person who received an application through an agent for a loan upon real estate sent a draft for the amount of the loan, payable to the mortgagor, to his agent, one C. at S., and instructed him to have certain liens on the property satisfied. The agent procured the indorsement of the mortgagor on the draft and retained the same on the pretense of satisfying the liens, but instead of doing so absconded with the money without paying the claims. *Held*, That the proof failed to show a delivery of the draft to the mortgagor, and did show that C. was intrusted with the same as agent of the lender.
2. ———: **FAILURE OF CONSIDERATION: CANCELLATION.** The loan having failed, a mortgage for the commission in procuring the same was properly canceled.
3. ———: ———: **BONA FIDE PURCHASER: JUDGMENT AGAINST ASSIGNOR.** The note and mortgage being void and having been transferred to a *bona fide* purchaser, judgment was properly rendered against the party making the assignment.

APPEAL from the district court for Nuckolls county.
Heard below before MORRIS, J.

Letton & Hinshaw, for appellant.

S. A. Searle, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against Bradshaw and wife to foreclose a certain mortgage. The other defendants were joined because they claimed an interest in the mortgaged premises.

The controversy in this court relates to a certain mort-

Figley v. Bradshaw.

gage made by Bradshaw and wife upon the property described in the petition for the sum of \$700 in favor of L. W. Goodrich. The loan was effected through one Samuel Carto at Superior. It appears from the evidence that there were certain liens upon the property then due and the loan was effected to pay off such liens. A draft for \$705 was sent by Mr. Goodrich to Carto. This draft was payable to Bradshaw. This, at Carto's request, he indorsed, but the possession was retained by Carto, who informed Bradshaw that he was to satisfy the liens out of the same. Carto thereupon collected the draft and left the country without paying the liens. Goodrich transferred the note and mortgage to Markham before due and he claims to be an innocent purchaser.

The court below made special findings; in effect, that Carto was the agent of Goodrich and that there had been no delivery of the draft. It also found that a mortgage given to Goodrich Bros. for commission was without consideration and that Markham was a *bona fide* purchaser, and rendered judgment as follows:

"It is therefore considered and adjudged by the court unless there shall be paid to the clerk of this court within twenty days from the entry of this decree, for the use and benefit of the said defendant, D. G. Markham, the said sum of \$803.10, that the defendants' (Bradshaw) equity of redemption be foreclosed and said mortgaged property be sold, and an order of sale be issued to the sheriff of said Nuckolls county, Nebraska, commanding him to sell said lots 11 and 12, in block 18, in the city of Superior, Nebraska, and bring the proceeds thereof into court, to be applied in satisfaction of the amount so found due, subject to the liens of Nellie A. Figley and the Beatrice Savings Bank Company.

"It is also considered and adjudged by the court that as to the notes and mortgage of Goodrich Bros. Banking Company, the same are decreed void and of no effect, being

without consideration, and that the mortgage be satisfied of record and canceled, and that the defendants Bradshaw have and recover of Goodrich Bros. Banking Company the sum of \$803.10, and that the costs of these proceedings be taxed to Goodrich Bros. Banking Company."

The judgment is sustained by the clear weight of evidence. Even Mr. Goodrich's own testimony shows that the draft was sent to Carto to clear off the liens on the property, and this agent seems to have betrayed his trust and failed to discharge the duty he had assumed and the employer must bear the loss. We do not care to comment on the testimony at length. The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

W. F. DOLAN ET AL. V. ELVIN S. ARMSTRONG.

[FILED OCTOBER 5, 1892.]

1. **Attachment: MOTION TO DISSOLVE: EVIDENCE: BURDEN OF PROOF.** When a defendant moves to dissolve an attachment on the ground that the affidavit for the attachment is untrue, and files in support thereof his affidavit denying the facts stated in the original affidavit for attachment, the burden of proof is upon the plaintiff to sustain the attachment by a preponderance of the evidence.
2. **———: ———: REVIEW.** The order of the trial court made at the hearing of such a motion, upon affidavits, will not be reversed by the supreme court, where there is a conflict of evidence, unless the ruling is manifestly against the clear weight thereof.

ERROR to the district court for Gage county. Tried below before BROADY, J.

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| 48 | 868 |
| 35 | 339 |
| 49 | 605 |

Conlon & Groves, R. W. Sabin, and Griggs, Rinaker & Bibb, for plaintiffs in error.

Rickards & Prout, contra.

NORVAL, J.

Plaintiffs in error commenced their action in the court below against defendant in error to recover the sum of \$1,155.77 for goods sold and delivered. At the same time an affidavit for an order of attachment was filed, which alleges as grounds therefor "that the defendant E. S. Armstrong is about to remove his property, or a part thereof, out of the jurisdiction of the court with the intent to defraud his creditors; that the defendant is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that the defendant has property and rights in action which he conceals; that the defendant has assigned, removed, and disposed of, and is about to assign, remove, and dispose of, his property with the intent to defraud his creditors; that the defendant has fraudulently contracted the debt and has fraudulently incurred the obligation for which suit is about to be commenced."

On the proper undertaking being filed, an order of attachment was issued, which was executed by levying on the property of defendant.

Subsequently, but before the trial of the cause upon its merits, the defendant filed a motion to dissolve the attachment and discharge the attached property, on the ground and for the reason that the facts stated in the affidavit, upon which the order of attachment was issued, were false and untrue. Numerous affidavits were read in support of the motion, and counter-affidavits were presented by the plaintiffs. Upon the hearing, the attachment was dissolved, which ruling of the court is assigned for error.

Counsel for plaintiffs in error have abandoned all

Dolan v. Armstrong.

grounds set up in the original affidavit for attachment, except the last, that the defendant fraudulently contracted the debt and incurred the obligation for which suit was brought.

At and for some time previous to the suing out of the attachment defendant in error was engaged in the mercantile business at Blue Springs. On the 29th day of December, 1890, he was indebted to plaintiffs in error in the sum of \$1,262.19 for goods sold and delivered, of which amount the sum of \$482.77 was then past due. On said date plaintiffs in error sent their attorney, George W. Groves, to Blue Springs for the purpose of collecting or securing their said claim. The attorney called upon Mr. Armstrong at the latter's place of business and demanded payment of the debt, or security. Defendant in error refused to give security, but paid the sum of \$100 to apply on the account, and promised to reduce the claim at least \$300 in three weeks, and also made a statement as to his financial condition, which seemed to satisfy Mr. Groves, and the demand for security or payment was not then further pressed. It appears from the record that after December 29, and prior to the suing out of the attachment, plaintiffs in error sold and delivered other goods to Armstrong to the amount of \$815.55, and during the same period they were paid by defendant over \$800, which was applied on their account for goods sold previous to December 29, thus leaving due the sum of \$340.22 on Armstrong's indebtedness incurred prior to said date, and the full amount of the goods since that time purchased. It is contended that defendant in error made a false and untrue statement regarding the value of his property, the amount of incumbrances thereon, and the amount of his liabilities to creditors other than plaintiffs in error, and that, relying on such representations, and believing the same to be true, the goods were sold to defendant upon credit. As to goods sold prior to December 29, 1890, and which are included in the account sued on,

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there is no competent or legal proof that defendant made any false representations to plaintiffs to induce the sale, or that he had prior thereto made any statement to them about his financial condition. We have not overlooked the fact that Mr. Groves, in one of his numerous affidavits filed in support of the attachment, does say that defendant, prior to November 26, 1890, in a letter written to plaintiffs, represented that "he was in good circumstances, and soon would be able to reduce their claim, as he was getting in better shape." This is the only testimony to be found in the entire record which plaintiffs could in any manner rely upon as tending to show that defendant made any representations to plaintiffs about his financial standing prior to December 29, and to us it is not convincing. Mr. Groves purports to give in his affidavit the contents of a letter, which, if ever written by Armstrong, and of this there is no competent proof, the affidavit discloses is still in existence, which letter it does not appear from the testimony Mr. Groves ever saw or had in his possession. Such testimony is wholly insufficient to sustain the charge of fraud or disprove the positive allegation made by defendant in his affidavit, that the debt upon which the attachment was issued was not fraudulently contracted. Fraud cannot be presumed, but must be proven by the party alleging it, by a clear preponderance of the evidence. The plaintiffs have shown no cause for an attachment for the goods bought prior to December 29, and even though sufficient cause existed for the issuing of an attachment for the goods purchased subsequent to said date, the attachment could not be sustained.

The precise point was ruled upon in *Mayer v. Zingre*, 18 Neb., 458. There an attachment was issued upon two causes of action, one for a debt fraudulently contracted and the other not so incurred. An order of attachment was issued, covering both causes of action, upon an affidavit alleging that "said defendant fraudulently contracted

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the debt and incurred the obligation for which this suit was brought." It was held that the attachment was properly discharged for want of grounds covering the whole indebtedness.

But we are not compelled to rest our decision upon this ground alone, as no cause for granting an order of attachment existed as to any portion of the goods purchased by defendant. There is no room for dispute that Armstrong on December 29, 1890, made a statement to Groves of the nature and value of his assets, as well as the amount of his indebtedness. The testimony is conflicting, not only as to what the representations were, but also whether the same were true or false.

Mr. Groves in his affidavit states that the defendant represented that he was in good financial condition and circumstances; that he owned the store building and the lot in Blue Springs, on which the same is situated, of the value of \$6,000, with an incumbrance of \$1,800; that he owned 160 acres of land in Deuel county, Dakota, worth \$2,400, with an incumbrance of \$1,300; that his stock of goods was worth \$2,500 and was unincumbered; that he had book accounts which could be collected to the amount of \$2,000; that he was buying no goods except what he was then purchasing of plaintiffs, and that he was not indebted to all his creditors more than \$300, except what he owed plaintiffs and the amount of liens on the real estate.

The affidavits of W. P. McDonald, the book-keeper and credit man for plaintiffs, and C. J. Drury, one of the plaintiffs, contain substantially the same allegations as made by Mr. Groves in his affidavit.

Plaintiffs also read on the hearing the following statements in writing signed by defendant:

"The following property is owned entirely by me: One two-story brick store building in the city of Blue Springs, Nebraska, and land occupied by said building, reasonably worth the sum of \$6,000, with \$1,800 incumbrance; stock

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of goods, wares, and merchandise worth the sum of \$2,500, no incumbrance; book accounts which can be collected, \$2,000; 160 acres of land in Deuel county, Dakota, incumbrance \$1,300; store building, insured, \$2,000. I do not owe in the aggregate more than \$300, except what I owe Dolan, Drury & Co. E. S. ARMSTRONG."

The defendant in his affidavit denies that he ever, at any time, stated to Groves or plaintiffs that he was in good financial condition, or that he was not buying any goods to run his store except what he was purchasing from Dolan, Drury & Co., and avers that he was at the time selling and handling goods in his business which plaintiffs did not handle and could not furnish, as they well knew; denies that he represented that he was not indebted to all his creditors to exceed \$300, except mortgages on his real estate, or that he stated that his store building was worth \$6,000, or that his land in Dakota was worth \$2,400, but charges the fact to be that said Groves, while in defendant's store, had a blank paper in his possession on which he pretended to take down the statement, which he, Groves, requested defendant to make, and that in the making of the statement Groves asked defendant what the store building was worth, and to which defendant replied he did not know the value thereof, but that it cost about \$6,000, and that there was an incumbrance thereon of about \$1,800. Alleges that the building did cost defendant \$6,200; that he did not state that his stock was worth \$2,500, but did say that he did not know the value of the goods, whereupon Groves requested him to guess as nearly as he could their worth, and that thereupon defendant said about \$2,000. Admits that he stated that he had book accounts in the neighborhood of \$2,000 at the time and avers that said statement was true; denies that he represented what the Dakota land was worth but informed Groves that the banker had written defendant it was of the value of \$1,800, but that defendant personally knew nothing about it except that it was mortgaged for

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\$1,500; that he informed Groves that his indebtedness for goods alone, aside from what he owed plaintiffs, would amount to about \$500; that thereupon Groves handed the statement to defendant for his signature, and affiant believes that the same had been written consistently with the representations he had made, and being busy waiting on customers, signed the same without careful reading; that the statements so made, so far as the same were correctly written down by Groves, are true.

The averments in the affidavits of McDonald and Drury relating to the representations of the defendant are entitled to no weight, for the reason that the uncontradicted testimony shows that neither of the affiants were present at Blue Springs at the time the representations were made and therefore could not have known personally of the transaction. They doubtless testified from information received from Groves or derived from the written statement signed by defendant, or both, which would be hearsay and inadmissible. The trial court had before it on one side, then, the affidavit of Groves and the written statement signed by defendant, and on the other side, the defendant's own testimony. As we have seen, the facts testified to by defendant are contradicted by Groves and the written statement, which raised a question of veracity for the trial court to decide. If the trial judge believed the testimony of defendant and accepted as reasonable and reliable his explanation in regard to the making and signing of the written statement, then he was justified in finding that defendant's version of the transaction was true. The conclusion reached by the trial court on the question is not so clearly against the preponderance of the evidence as to warrant us in disturbing it. To do so would be to ignore the rule which has been so often announced and applied by this court in cases of this kind, that the findings of fact by a trial court will not be reversed when there is a conflict of evidence, unless manifestly wrong. (*Mayer v. Zingre*, 18

State, ex rel. Bare, v. Lincoln County.

Neb., 458; *Holland v. Commercial Bank*, 22 Id., 571; *Johnson & Co. v. Steele*, 23 Id., 82; *Feder, Nusbaum & Co. v. Solomon & Nathan*, 26 Id., 266.)

Accepting then as true the testimony of defendant bearing upon the subject of representations, does the evidence show his statements were false? We answer in the negative. The evidence is overwhelming that the defendant truthfully stated the value of his property, the amount of incumbrances thereon, and the amount of his indebtedness. There is no foundation for the charge that he fraudulently contracted the debt for the recovery of which suit was brought. The order of the district court dissolving the attachment is

AFFIRMED.

THE other judges concur.

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STATE OF NEBRASKA, EX REL. IRA L. BARE ET AL., V.
LINCOLN COUNTY ET AL.

[FILED OCTOBER 5, 1892.]

Mandamus to County Board: AWARD OF CONTRACT FOR PRINTING AND PUBLISHING DELINQUENT TAX LIST. While a county board may, in its discretion, let the contract for printing and publishing the delinquent tax list and the proceeding of the board to the lowest bidder, yet, as there is no provision of statute making it the duty of such board to so award the contract, *mandamus* will not issue to compel such action. *State v. Dixon County*, 24 Neb., 106, adhered to.

ORIGINAL application for *mandamus*.

George E. French, A. H. Church, T. C. Patterson, and
Grimes & Wilcox, for relators.

George T. Snelling, and T. Fulton Gantt, contra.

NORVAL, J.

This is an application for a peremptory *mandamus* to require the board of supervisors of Lincoln county to award to relators the contract for the county printing and for publishing the delinquent tax list for the year 1892.

It appears from the pleadings and evidence that one of the relators, Ira L. Bare, is the owner and publisher of the *North Platte Tribune*, a newspaper published at North Platte, and of general circulation in said Lincoln county; that the other relator, Harvey W. Hill, is the owner and publisher of the *North Platte Telegraph*, a weekly newspaper published at North Platte, and of general circulation throughout said county; that on the 28th day of November, and for four successive weeks thereafter, the county clerk of said county published in the said *North Platte Telegraph* a notice to the effect that bids would be received until noon of the 1st day of January, 1892, for all books, blanks, and stationery required for the use of the county officers, together with all printing, publishing, and advertising required for the year 1892, the board reserving the right to reject any and all bids; that said printing, publishing, and advertising were for a greater sum than \$200; that, pursuant to said notice, relators, on December 31, 1891, made and filed the following bid:

“NORTH PLATTE, NEB, December 31, 1891.

“To the Honorable Board of County Commissioners of Lincoln County: We, the undersigned, publishers respectively of the *North Platte Tribune* and of the *North Platte Telegraph*, submit the following bid for the county publishing for the year 1892:

“The commissioners' proceedings in full, road notices, treasurer's statements, bond propositions, and official notices of the county clerk will be published in both of said

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papers at one-twentieth of the legal rate, that is, one-fortieth of the legal rate to go to each publisher; the delinquent tax list will be published in each of the said papers at one-half the legal rate, each paper to receive five cents for each land description and two and one-half cents for each lot description.

“Bond in any reasonable sum for the faithful performance of the work to be furnished by each of the undersigned in case the contract is awarded to us.

“Respectfully yours,

“IRA L. BARE,

“*Publisher of the Tribune.*

“HARVEY H. HILL,

“*Publisher of the Telegraph.*”

That on the same day the Independent Era Publishing Company, in response to said notice, filed its bid agreeing to publish all proceedings of the board free of charge, publish all road notices, election notices, notice to voters, and all other notices ordered by the board or county clerk, for one-half statutory rates, and soliciting the tax list on the terms specified by section 109, chapter 77, of the Compiled Statutes. The bid also specified prices for furnishing the county with blanks and commercial printing. That it always has been the usage and custom in said county for the county clerk to advertise for and invite bids from the various newspapers published in said county, to be filed with the county board, to do the county printing, publishing, and advertising required by law, and it has been the custom of the county board to award the contract upon such bids so filed to the lowest and best responsible bidder; that although relator's bid is the lowest and best the county board refused to award the contract to them to do said publishing, printing, and advertising, and refused to designate the *North Platte Telegraph* and the *North Platte Tribune* as the newspapers in which said printing, publishing, and advertising should be done for the year 1892, but said

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board at its meeting held on January 2, 1892, passed a resolution to the effect that the county clerk having exceeded his authority in advertising for bids for county printing, publishing, and advertising, all bids on file for such work, other than for books, blanks, and stationery, be ignored. That subsequently, on the 9th day of January, 1892, the county board passed and spread upon its records the following:

“Whereas it is by law made the duty of the county commissioners to designate a newspaper published in the county of Lincoln, Nebraska, having a general circulation therein, to do the printing and advertising for their county, other than books, blanks, and stationery, for the year 1892, it is therefore resolved by the board of county commissioners of Lincoln county, in regular session, that the *Independent Era*, published in the city of North Platte, Lincoln county, Nebraska, be and is hereby designated as the newspaper in which shall be published and advertised the notices of sales of real estate upon which taxes are delinquent and remain unpaid, otherwise known as delinquent tax list, as provided in section 109 of chapter 77 of the Compiled Statutes, entitled ‘Revenue,’ together with commissioners’ proceedings of regular and special meetings, and such other printing, publishing, and advertising as may be necessary for the county of Lincoln, Nebraska, for the year 1892.”

It is not claimed by the respondents that the bid of the Independent Era Publishing Company was either the lowest or the best, but on the contrary it is conceded that the bid of relators is by far the lowest and best. The only question, therefore, presented by the record in this case for the court to determine is, Does the statute make it the duty of a county board to advertise for bids, and let by contract to the lowest bidder all county printing, publishing, and advertising, such as publishing the proceedings of the board and the printing of the delinquent tax list? The

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same question was fully considered by this court in *State v. Dixon Co.*, 24 Neb., 106, in which it was held that a county board was not required to let by contract to the lowest bidder the printing of the proceedings of the board or the publishing of the notice required by law to be given by the county treasurer of the sale of real property for delinquent taxes due and unpaid thereon. We have re-examined the question, and are satisfied that the decision in *State v. Dixon County* is sound and should be adhered to.

There is no provision of statute making the duty of county boards to let contracts for county printing, publishing, and advertising of the character involved herein to the lowest and best bidder. The legislature has, however, enacted provisions requiring county boards to award contract for the furnishing of all books, blanks, and stationery required for the use of the county officers to the lowest bidder when the cost of furnishing the same exceeds the sum of \$200 per year. (See sections 149, 150, 151, and 152, chapter 18, Compiled Statutes.) In view of the provisions of said sections the omission of the law-makers to provide that contracts for the printing of the delinquent tax list and the publishing of the proceedings of the board shall be awarded upon competitive bids is significant. The only proper conclusion to be drawn from the failure to so provide is that no legal duty rests upon a county board to invite bids for such work, or to award contracts therefor to the lowest and best bidder. The fact that it had in previous years been the custom in Lincoln county to let the contract for county printing, publishing, and advertising to the lowest bidder does not change the legal aspect of the case. While there is no law which requires county boards to let such contracts in the mode contended for by the relators, yet it is within their discretion so to do. Although the respondents did not act for the best interest of the county in making the contract complained of in this

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action, yet, as no statutory provision has been disregarded, the relators are not entitled to the relief demanded. The writ is denied.

DISMISSED.

THE other judges concur.

ST. PAUL FIRE & MARINE INSURANCE COMPANY ET
AL. V. SOLOMON GOTTHELF.

[FILED OCTOBER 5, 1892.]

1. **Harmless Error.** A judgment will not be reversed on account of harmless error.
2. **Fire Insurance: NOTICE OF LOSS: TERMS OF POLICY: WAIVER.**
Provisions of an insurance policy covering a stock of goods, for notice of loss within a specified time and in a particular manner, will be held to have been waived by the insurer where, with knowledge of the loss of part of said stock by fire, it, by its adjusting agent, demands and obtains possession of the remainder of the goods and books of the insured and is engaged several days, with the help of the latter, in ascertaining the amount of the loss.
3. **Corroborating Evidence: USE OF MEMORANDUM BY WITNESS: BOOK ENTRIES.** A witness who at the time of purchasing a bill of goods entered each item in a book, together with the cost thereof, may use such book as a memorandum, and when it is shown by his testimony that he knows the entries therein to be correct and that they were made at the time of the transaction in question, such book may properly be introduced in evidence, not for the purpose of proving the purchase of the goods, but in corroboration of the witness and as a detailed statement of the items involved.
4. **Trial: LEADING QUESTION: DISCRETION OF TRIAL COURT.** As a general rule, the allowing of a leading question is a matter within the discretion of the trial court, and a judgment should not be reversed on that ground unless it is apparent that there has been a clear abuse of discretion.

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| 53 | 91 |
| 54 | 308 |
| 35 | 351 |
| 57 | 564 |

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5. **Award: VOID FOR UNCERTAINTY.** An award will be held void for uncertainty when no amount is named therein or means indicated by which it can be ascertained.
6. ———: ———. *Held*, That the finding in the record was a mere invoice of goods and not an award of arbitrators.
7. **Instructions: HOW CONSTRUED.** A paragraph of a charge to the jury should be construed as a whole, and, if so construed it correctly states the law, will not be condemned because a detached part thereof, construed by itself, might be subject to criticism.
8. ———. *Held*, That there is no error in the giving and refusing of instructions prejudicial to plaintiffs in error.
9. **Evidence examined, and held sufficient to sustain the verdict and judgment of the district court.**

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Six separate actions were commenced by Solomon Gotthelf against The St. Paul Fire & Marine Insurance Company, The Hamburg-Bremen Fire Insurance Company, The Anglo-Nevada Assurance Corporation, The North British & Mercantile Insurance Company, The Oakland Home Insurance Company, and The United States Fire Insurance Company. By agreement of the parties the actions were consolidated and tried together. Judgment was rendered for plaintiff below, to reverse which each defendant prosecuted proceedings in error.

Chas. O. Whedon, for plaintiffs in error:

The facts as pleaded did not constitute a waiver of proof of loss. (*Blossom v. Lycoming Ins. Co.*, 64 N. Y., 162; *Brink v. Hanover Ins. Co.*, 70 N. Y., 593; *Von Genechtin v. Citizens Ins. Co.*, 39 N. W. Rep. [Ia], 881; *Briggs v. Fireman's Fund Ins. Co.*, 31 N. W. Rep. [Mich.], 616; *Beatty v. Lycoming County Mutual Ins. Co.*, 66 Pa. St., 9.) The award was final as between the parties. (*Goodridge v. Dustin*, 5 Met. [Mass.], 363; *Wheeler v. Watertown Ins.*

Co., 131 Mass., 1; *Koon v. Hollingsworth*, 97 Ill., 54; *Kimball v. Walker*, 30 Id., 482; *Burchell v. Marsh*, 17 How. [U. S.], 344; *Hadaway v. Kelly*, 78 Ill., 286; *Tynan v. Tate*, 3 Neb., 390; *Holmes v. Aery*, 12 Mass., 134.

Pound & Burr, contra:

The facts alleged in the petitions and proved on the trial show complete waiver of proof of loss. (*Franklin Ins. Co. v. Updegraff*, 43 Pa. St., 359; *Blake v. Ins. Co.*, 12 Gray [Mass.], 265; *Susquehanna Ins. Co. v. Staats*, 102 Pa. St., 529; *Graves v. Washington Ins. Co.*, 12 Allen [Mass.], 391; *Phoenix Ins. Co. v. Barnd*, 16 Neb., 89; *Carroll v. Girard Ins. Co.*, 72 Cal., 297; *Bammessel v. Brewers Ins. Co.*, 43 Wis., 463.)

Post, J.

The defendant in error commenced six different actions in the district court of Lancaster county on separate policies of insurance by the plaintiffs in error to recover for damage by fire to a stock of goods covered by said policies. By agreement of parties the several actions were consolidated and tried together, resulting in verdicts against each of the companies named. A motion for a new trial was made by each of the defendants below, which motions were overruled and judgments entered in accordance with the verdicts, and said cases removed to this court by petitions in error. The pleadings are the same in each case, except as to the amount of damage claimed. The first error alleged in the brief of plaintiffs in error is the overruling of their motion to require the plaintiff below to separately state and number his causes of action. Each petition contained two causes of action, one on the policy of insurance and the other for money expended for clerk's and appraisers' fees. The ruling complained of, if erroneous, is error without prejudice, since, on the submission of the case, the jury were instructed that there could be no recovery for

money expended for clerk hire or appraisers' fees, and expressly limited the right of plaintiff below to recover to the other cause of action, viz., for damage to the stock of goods.

Second—It is claimed that the district court erred in denying the motion of defendants below to strike out the seventh paragraph of the petition, as follows: "That immediately after said fire the different insurance companies who had policies and risks upon the aforesaid goods and property were notified and informed of said fire, and that each of said companies, as well as defendant, sent or had duly authorized agents to come upon the said premises and adjust the loss caused by said fire and took an inventory of said goods and property, and said defendant, after taking said inventory, and all of said other insurance companies, insisted that plaintiff's loss was only \$2,000, when in truth and in fact it was and is \$8,222.53, and that they thereby waived any proof of loss as required by said different policies and by the policy of the defendant." The foregoing allegation should be construed in connection with the eighth paragraph as follows: "That shortly after the said fire the several agents and adjusters of the said defendant, and all companies having policies on said stock with defendant, came to the city of Lincoln and, at their request and demand, took charge of the goods and stock, as well as the books of plaintiff, and the plaintiff chose one person, and said agents and adjusters the other, and they proceeded and took an inventory of said goods for the purpose of ascertaining how much the loss of plaintiff was, and for a period of over one month the said agents and adjusters had possession and control of said books stock, and property, and the plaintiff aided and assisted them all that he could, and the inventory was taken in duplicate, one was kept by the plaintiff and one by the defendant and his other insurance agents and adjusters; and the inventory so made by plaintiff and defendant found that

there was \$7,208.09 worth of goods and property in stock, not deducting any damage therefrom, and not deducting any goods that was a total loss by said fire, and which inventory plaintiff will produce at the trial of this action, and from which, together with plaintiff's books, it will fully appear that the loss at said fire was and is the said sum of \$8,222.53." These allegations, in our judgment, sufficiently charge a waiver of the conditions of the policies with respect to proof of loss.

The same question was fully considered by this court in the case of *Billings v. The German Ins. Co.*, 34 Neb., 502. The conclusion there reached, which we believe to be in accord with the clear weight of authority, was that similar provisions in a policy of insurance for forfeiture will be held to have been waived by the insurer when it is informed of the fact by reason of which the forfeiture is claimed, but thereafter continues to treat the contract as binding and induces the insured to act in that belief. The facts alleged in this case bring it clearly within the rule above stated. If, as alleged, the insurance companies, by their adjusting agents, soon after the fire, demanded and obtained possession of the stock of goods in question, and also the books of the insured, and retained possession thereof for a month, being, during all of said time, engaged, with the assistance of the latter, in ascertaining the amount of the loss, such facts would amount to a waiver of the proof of loss and excuse the making of such proof in the manner and within the time specified in the policies. The authorities cited in *Billings v. The German Ins. Co.* fully sustain this proposition. Also in the answers filed in the district court it is charged that the amount of loss was by mutual agreement submitted to arbitration, and that an award was made which is pleaded as a defense. This, we think, is a waiver of the proof of loss provided by the policies. (*Carroll v. Ins. Co.*, 72 Cal., 297; *Bammessel v. Ins. Co.*, 43 Wis., 463.)

Third—Plaintiff below, to prove the amount and value of the goods insured, introduced evidence tending to show that in the month of October, 1887, he had purchased a bill of goods of August Vick in the city of St. Louis amounting to about \$2,300. He testified that at the time he purchased said goods he correctly entered every item with the cost thereof in a book. In this he is corroborated by Mr. Vick. Said book, with the entries therein, having been identified, was offered in evidence in connection with the testimony of the plaintiff below and received over the objection of the defendants, and which is now assigned as error. It will be observed that the book was used by the witness as a memorandum only in connection with his testimony. In order to lay the foundation for the admission in evidence of an entry used for that purpose it must be shown by the witness that he once knew the facts stated in the memorandum, and that he made the entry at the time or soon after the transaction; that he intended to make it correctly, and that he believed it to be true. (15 Am. & Eng. Ency. of Law, 263.) The book was rightly admitted, the proper foundation having been laid, not as proving the purchase of the goods, but in corroboration of plaintiff below and as a detailed statement of the items involved. (1 Greenleaf on Evidence, 437 and note.)

Fourth—A further objection is made that the time of the purchase of the so-called Vick bill was too remote for the purpose of proving value at the time of the fire January, 1889. There is nothing in the objection made. A considerable part of the stock had been destroyed by the fire and the portion saved was badly damaged. Plaintiff below was for that reason properly permitted to show the amount and value of the original stock and subsequent purchases and to deduct the amount of sales since he commenced business in October, 1887, and value of goods remaining after the fire. This was proper, and the value of the goods in the Vick bill was therefore a proper subject for consideration by the jury.

Fifth—Objection was made to a leading question put to plaintiff below, as a witness in his own behalf, by his counsel. The court may in its discretion permit leading questions, and where there has been no abuse of that discretion a judgment will not be reversed on that ground alone. In this case there does not appear to have been an abuse of discretion. Nor can plaintiffs in error be said to be prejudiced thereby, as substantially the same answer had been previously given to other questions without objection.

Sixth—Defendant in error was asked, on cross-examination, how much he paid Vick for the goods bought of the latter in October, 1887, to which objection was interposed and sustained on the ground that it was immaterial, which ruling is now assigned as error. The ruling in question could not have prejudiced the plaintiffs in error, for the reason that the witness had already testified on direct examination that he could not give the value of the goods without referring to the book above mentioned. Also, on cross-examination he had testified without objection as follows:

Q. What did you pay for the goods you bought in that book (referring to the memorandum above mentioned)?

A. I can't remember.

Q. About how much?

A. I can't remember.

Q. About what did you pay for them?

A. I don't remember; I cannot tell you.

We have no reason to infer that further cross-examination on that subject would have profited the plaintiffs in error, and cannot say that the court erred in the limitation imposed.

Seventh—Defendant in error was asked on direct examination what per cent should be added to the cost price of goods for freight, unpacking, marking, and exposing them for sale, to which objection was made on the ground that it was incompetent and immaterial. The cost of handling,

as well as freight charges, was a proper subject for consideration under the pleadings. The objection raises no question except that of the materiality of the evidence, and was therefore rightly overruled.

Eighth—In the several answers it was alleged that all of the questions involved had been submitted to arbitrators, who made an award, and which is one of the defenses relied on. This allegation is denied by the defendant in error, who alleges in his reply that the so-called arbitrators were selected merely for the purpose of making an inventory of the goods remaining after the fire. This question was submitted to the jury under instructions which fairly state the law. The finding for the defendant in error on that issue cannot be said to be so decidedly against the weight of evidence as to call for action by this court. Nor are we referred to any finding or report having the semblance of an award. The only return made by the arbitrators or appraisers is entitled an "Invoice of Stock of Solomon Gotthelf taken January 19, 1889." It comprises fifty-four pages of a book, which in three columns show, respectively, the items appraised, the cost thereof, and the damage thereto. On some of the pages are figures indicating the per cent deducted on account of damage. There is a footing in pencil mark on each page of the column, indicating the cost and the damage, but no total appears of either. An award will be held void for uncertainty when no amount is named, or means indicated by which it can be found. (*Waite v. Barry*, 12 Wend. [N. Y.], 377.) The finding in question includes only the stock as it appeared after, and makes no reference whatever to the value thereof before the fire: We think the jury were warranted on the evidence before them in finding for defendant in error on the question of arbitration.

Ninth—Exceptions were taken to the refusing of instructions asked and the giving of others by the court on its own motion. The instructions in question are too nu-

merous to copy into this opinion. They may be for convenience divided into two sets or classes. The first set refers to the question of waiver. Those given state the law in accordance with the view already expressed, and in giving them and refusing those asked there is no error. The other instructions to which objection is made refer mostly to the question of damage. On the trial it was agreed "that the books of the plaintiff, exclusive of the little book B already introduced in evidence, show that the purchase of goods by the plaintiff before the fire amounted to the sum of \$13,574.87; and that from this amount of goods the plaintiff had sold goods to the amount of \$12,685 before the fire." Referring to the above stipulation the court charged the jury as follows: "Fifth—If you should find for the plaintiff in this action, then, in determining the damage sustained by the plaintiff, it would be proper for you to take into account the total value of the goods purchased by the plaintiff prior to the fire, which in this action it is admitted by both parties, excluding the goods as shown in the little book called 'Exhibit B,' to be \$13,574.88. It is further admitted by the evidence that the plaintiff had sold out of said goods prior to the fire \$12,685 worth of goods. To determine the amount of the goods on hand at the time of the fire, you should deduct from the amount of goods sold the amount of profits upon said goods as shown by the evidence and this method, that is, taking all the goods purchased by the plaintiff that the evidence shows went into said stock, prior to the time of said fire, deducting from said goods the amount of the sales, less the profits as shown by the evidence, would be one method of determining the value of goods on hand at the time of the fire. The question of profits upon the sales made by the plaintiff is a question for you to determine from all the evidence before you, and in determining this question you should consider the evidence as to the amount of profits upon the several different kinds and classes of goods, and allow such profits

as the evidence shows you to have been made upon the kind and class and character of goods handled and sold by the plaintiff. In determining the value of the goods on hand after the fire, and the damage to the same, it is proper that you should take into consideration the invoice and appraisal offered in evidence and give to it such weight as you believe it is entitled to under all the evidence. In determining the value of the goods at the time of the fire you should determine the value of said goods in this market as shown by the evidence. It is proper to take into account the cost price of said goods as shown by the evidence, and to this cost price you should add such a sum as you believe from the evidence is necessary to make the real and actual value of said goods in this market at the time of said fire. No arbitrary or particular sum should be allowed by you, but you should determine its value from the evidence before you in this case. If you should find for the plaintiff in these actions, then you will determine from the evidence whether or not there was a total loss of any of the goods and property of said plaintiff by said fire, and determine from all the evidence the value of such goods, if any, you find to have been totally destroyed and allow the plaintiff therefor."

The objection to the instruction set out is that the court misconstrues the agreement referred to therein. In this contention we agree with counsel for plaintiffs in error, as the agreement in question relates to the first cost of the goods only, while the court seems to construe it as referring to the value thereof. The instruction as a whole, however, fairly states the law, and the jury could not have been misled by the direction contained therein. By it they are in effect directed to determine the value of the goods on hand at the time of the fire from all the evidence before them, including cost thereof.

Tenth—Finally it is contended that the damage is excessive. We have carefully read over the voluminous

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record and are unable to say that the total of the verdicts is excessive within the rule which would warrant a reversal by this court. There is a sharp conflict of testimony upon that question. The principal controversy on that branch of the case was the profits realized on the goods sold by defendant in error. By the agreement above referred to it appears that he had made sales from the stock in question to the amount of \$12,685. In determining the value of the stock therefore the profits included in the amount of the sales become material. Three witnesses, including the defendant in error, testify from actual knowledge that the goods in question had sold at a profit of one hundred per cent, and in this they are corroborated by a fourth. Calculating the profits at fifty per cent, the verdict may still be sustained. There is no prejudicial error in the record and the judgment below is

AFFIRMED.

THE other judges concur.

JOHN W. BOWMAN, APPELLANT, V. OLIVER K. GRIFFITH ET AL., APPELLEES.

[FILED OCTOBER 5, 1892.]

1. **Deed: PRESUMPTION OF DELIVERY AND ACCEPTANCE.** When a deed, which is beneficial in its character to the grantee named therein, is properly acknowledged and recorded, the presumption of law is that it was delivered by the grantor and accepted by the grantee.
2. ———: **RECORD: RECITALS.** Where a deed, beneficial to the grantee, recites that it is executed for the purpose of correcting an error in a prior deed between the same parties, the record thereof is evidence of the facts therein recited.

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| 49 | 716 |
| 51 | 44 |
| 52 | 177 |
| 52 | 477 |
| 55 | 24 |
| 55 | 584 |
| 35 | 361 |
| 57 | 290 |
| 57 | 733 |
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| 59 | 730 |
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3. **Bona Fide Purchaser of Real Estate.** Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor.
4. On the evidence in the record, *held*, that the defendant is not an innocent purchaser for value.
5. **Statements of Agent: ESTOPPEL.** Statements of an agent with authority to collect rents and care for the property of his principal will not be received in disparagement of the title of the latter so as to work an estoppel in favor of one who purchased from a stranger claiming adversely to such principal.
6. **Quitclaim Deed: ACCEPTANCE BY GRANTEE.** One who accepts a quitclaim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

G. M. Lambertson, for appellant.

Chas. O. Whedon, contra.

POST, J.

This action was begun in the district court of Lancaster county by the plaintiff to quiet title, as against the defendants, to the northwest quarter of the northeast quarter of section 26, township 11 north, of range 6, in said county.

From the pleadings and proofs it appears that plaintiff claims title through the following conveyances: First—Patent from the United States to John Brown, August 1, 1868; filed for record July 1, 1871. Second—John Brown to Thomas Hyde, warranty deed, July 5, 1869; filed for record August 18, 1869. Third—Thomas Hyde to Reddington Stanhope, warranty deed, May 22, 1883; filed for record May 26, 1883. Fourth—Reddington Stanhope to F. M. Hall, quitclaim deed, July 21, 1883; filed for rec-

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ord July 23, 1883. Fifth—F. M. Hall to A. B. Smith, warranty deed, July 21, 1884; filed for record August 5, 1884. Sixth—A. B. Smith to J. W. Bowman, plaintiff, warranty deed, September 21, 1885; filed for record September 23, 1885.

The defendant W. C. Griffith filed a disclaimer in the district court, but the other defendant, Oliver K. Griffith, disputes plaintiff's claim, and by way of cross-bill asks to have the title to the property in controversy quieted in him. He claims title through the following conveyances: First—Patent, United States to John Brown, August 1, 1868; filed for record July 1, 1871. Second—John Brown to Hazleton S. Moore, warranty deed, December 8, 1868; filed for record December 18, 1868. Third—Hazleton S. Moore to Oliver K. Griffith, defendant, warranty deed, January 14, 1880; filed for record January 19, 1880.

The first question presented by the record is whether the deed from Brown to Moore, through which defendant claims, includes the property in controversy. That deed, as appears from the above statement, was filed for record long before the execution of the deed from Brown to Hyde, hence it is apparent that if sufficient to pass the title to the grantee therein, Hyde could acquire no title by his deed. According to the description in the deed in question the property conveyed by Brown to Moore is "The northwest quarter and the southwest quarter of the northeast quarter of section 26," etc. The description, we think, does not include the property in controversy. The said deed on its face purports to convey two hundred acres, to-wit, all of the northwest quarter of the section aforesaid and the southwest quarter of the northeast quarter thereof. It is evident therefore that the record of said deed was not notice of any equitable claim that Moore may have had to said property at the time of the conveyance by Brown to Hyde, hence if the latter was a *bona fide* purchaser within the true definition of the term, he acquired a good title thereto

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as against Moore and the defendant who claims through him. In *Coggsell v. Griffith*, 23 Neb., 334, on the evidence in the record it was held that Brown had sold to Moore the west half of the northeast quarter of said section, including the land in controversy, and intended to convey the same to him, but by mutual mistake the description above quoted was inserted in the deed instead of the land intended to be conveyed thereby. That case was decided upon evidence not before us now, hence, although apparently relied upon by both plaintiff and defendant, cannot be said to be authority for either. The question is therefore, on the record of this case, What are the equities of Moore and his grantees in the subject of the controversy? This brings us to the consideration of an instrument not enumerated in either list of conveyances comprising the respective chains of title. The defendant having laid the necessary foundation therefor, introduced in evidence the record of a subsequent deed from Brown to Hyde, dated May 15, 1870, and filed for record the same day. Said deed is in the usual form and the property conveyed is the southwest quarter of the northwest quarter of section 26, etc., and appears to have been made for the purpose of correcting an error in the prior deed between the same parties, dated July 5, 1869, under which the plaintiff claims. Among others it contains the following recital:

“This deed is made to correct a mistake made by the above named grantors to the above named grantee, dated the 5th day of July, A. D. 1869, whereby the above named grantors conveyed to said grantees the northwest quarter of the northeast quarter of section 26 aforesaid, together with other portions of said section in said deed described, whereas the lands intended to be conveyed thereby were, and are, the east half of the northeast quarter of section 26 aforesaid, and the south half of the northwest quarter of section aforesaid, the northwest quarter of the northeast quarter of said section 26 in said deed de-

scribed having been previously conveyed to H. S. Moore by deed, dated the 8th day of December, 1868."

It is argued by defendant that the above record does not prove the error alleged in the first deed, inasmuch as Hyde did not reconvey the property in controversy to Brown but subsequently deeded it to Stanhope. Aside from the recital in the record set out above, there is in this case no evidence of any title, legal or equitable, in defendant or his grantor, Moore. His rights therefore depend upon the inference which is to be drawn from the recording of the second deed. If that instrument was delivered and accepted by the parties, and for the purpose expressed therein, that fact, it must be conceded, is evidence from which we should find that Moore was the equitable owner of the property in dispute, and that he should recover unless plaintiff's equities are superior by reason of having purchased without notice of the rights of the former, which will be considered hereafter. The general rule is that the registration of a deed is *prima facie* evidence of its delivery. (Devlin on Deeds, 292.)

It is said by Judge Dillon in *Robinson v. Gould*, 26 Ia., 89, that "when a deed beneficial in its character to the grantee has been properly acknowledged and recorded, the presumption of law in favor of the grantee is that it has been delivered, and the burden of proof is upon the party claiming the nondelivery to clearly overcome that presumption." That the deed under consideration was beneficial to Hyde will not be questioned, since by it Brown conveys to him forty acres of land, the southeast quarter of the northeast quarter of the section aforesaid not included in the prior deed. The presumption is that he Hyde, took and holds title to the property last described under that conveyance. On the other hand, the deed was certainly not beneficial to Brown, who thereby conveyed the property last described. We think, therefore, that the acceptance of said deed by Hyde, the only beneficiary thereof,

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should be presumed from the fact that it was subsequently filed for record, and that the record aforesaid was rightly admitted in evidence. That instrument fully proves the facts as alleged by defendant, viz., the mistake in the prior deed to Hyde and that Moore was, at the time of the execution thereof, the equitable owner of the property in controversy. Nor is the presumption aforesaid overcome by the fact that Hyde subsequently asserted title to said land by deeding it to Stanhope. He was required to accept or reject the said deed as an entirety. By taking title through it he must be held to have assented to the conditions upon which the property named therein was conveyed. In other words, as between Brown and Hyde, it is an admission by the latter that the land in dispute was in equity the property of the former and his grantees.

We come now to the question, is plaintiff a *bona fide* purchaser? His contention is that he purchased the property without notice of any claim of the defendant thereto and that his equities are therefore superior and should prevail against those of the latter. A *bona fide* purchaser is one who purchases for value without notice of the equities of third parties. (*Snowden v. Tyler*, 21 Neb., 199.) The question of the equities of the respective parties is distinctly presented by the pleadings. And the plaintiff while a witness in his own behalf testifies as follows:

Q. You say you made no inquiry about the title before you bought it?

A. No, sir; none whatever.

It does not appear from his testimony that he relied upon the title of Smith, his grantor, or that he paid the consideration named without notice of the rights of the defendant. Nor does it appear that he was ever advised in whom the record title rested. This showing falls far short of establishing his claim to the rights of a subsequent purchaser in good faith. The burden was upon him and he was bound to prove both payment in ignorance of defend-

aut's equities and that he relied upon the title of his grantor. (*Shotwell v. Harrison*, 22 Mich., 410; *Sillyman v. King*, 36 Ia., 207; *Denning v. Smith*, 3 Johns. Ch. [N. Y.], 332; *Seymour v. McKinstry*, 106 N. Y., 230.) In the last case cited it is held on the authority of *Denning v. Smith, supra*, that where a claim can be sustained only upon the ground that the person asserting it is an innocent purchaser he must positively deny the equitable rights of another, although not charged. It is claimed that defendant is estopped to now claim the land in controversy, because W. C. Griffith, his agent, stated to Mr. Hall, through whom plaintiff claims, that he, defendant, made no claim to said property. There are at least two sufficient reasons why the statement aforesaid will not work an estoppel as against the defendant O. K. Griffith: First—It is not shown that W. C. Griffith had any such authority as would bind his principal, O. K. Griffith, by a statement in disparagement of his title, Second—Hall, who was then negotiating for the property, accepted a quitclaim deed from Stanhope, his grantor. (*Snowden v. Tyler, supra.*)

Finally, it is claimed that defendant is estopped to claim this forty acres for the reason that in the case of *Coggswell v. Griffith, supra*, his contention was that he had purchased two hundred acres from Moore. A sufficient answer to this claim is that the property now in controversy was not involved in that suit. Neither are the parties identical, hence defendant would not be concluded by any decree in that case, had the court therein assumed to determine the rights of the parties with respect to the property in controversy, which it is clear was not attempted. At most it can only be said that he, in that case, insisted upon a construction of his deed inconsistent with the one he now contends for. Whatever view we may feel constrained to take of his conduct in that case as a question of morals, it is apparent that plaintiff has not been misled thereby to his detriment, and that in legal contemplation he is not now

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estopped to demand the property which in equity he is entitled to recover. The judgment of the district court is

AFFIRMED.

THE other judges concur.

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WILLIAM TIPPY V. STATE OF NEBRASKA.

[FILED OCTOBER 11, 1892.]

1. **District Court: TERMS IN DIFFERENT COUNTIES OF SAME DISTRICT AT SAME TIME.** The general rule is that a court cannot be held at a time when there is clearly no authority to hold it, and if there was no statutory authority to that effect the district court in those districts having but one judge could not be held in two counties of the same district at the same time, but, under the constitution and statutes of this state, terms of the district court may be held at the same time in different counties of the same judicial district, and, when necessary, the district court sitting in any county may be continued into and held during the term fixed for holding such court in any other county within the district, or, it may be adjourned and held beyond such time.
2. There is no material error in the record.

ERROR to the district court for Saline county. Tried below before GASLIN, J.

Shannon S. Alley, for plaintiff in error:

Unless authorized by statute, terms of court cannot be held in different counties at the same time in any district having but one judge. (*Bates v. Gage*, 40 Cal., 183; *People v. O'Neil*, 47 Id., 109; *Freeman*, Judgments, sec. 121; *Batten v. State*, 80 Ind., 394; *Dunn v. State*, 2 Ark., 229; *In re Millington*, 24 Kan., 214; *Grable v. State*, 2 G. Greene [Ia.], 559; *Archer v. Ross*, 2 Scammon [Ill.], 303; *Gregg*

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v. Cooke, Peck [Tenn.], 82; *Galusha v. Butterfield*, 2 Scammon [Ill.], 227; *Smithson v. Dillon*, 16 Ind., 169; *Samuels v. State*, 3 Mo., 42; *Cain v. Goda*, 84 Ind., 209; *MoCool v. State*, 7 Id., 378.)

George H. Hastings, Attorney General, contra:

A term of court may be held in one county of a district which laps onto the term of another county in the same district. (*State v. Leahy*, 1 Wis., 225; *State v. Knight*, 19 Ia., 94; *State v. Stevens*, 25 N. W. Rep. [Ia.], 777; *State v. Peterson*, 25 Id., 780; *Brewer v. State*, 6 Lea [Tenn.], 198; *Cheek v. Bank*, 9 Heiskell [Tenn.], 489; *State v. Clark*, 30 Ia., 168; *Harris v. Gest*, 4 O. St., 473; *State v. Montgomery*, 8 Kan., 351; *Cook v. Smith*, 54 Ia., 636.)

MAXWELL, CH. J.

The plaintiff in error was convicted of manslaughter in the district court of Saline county and sentenced to imprisonment in the penitentiary for ten years. He relies upon two errors for a reversal of the judgment. First—That there is but one judge in the seventh judicial district; that in 1891 the terms were fixed by law, viz., Saline county, September 15; Clay county, November 10; Fillmore county, November 24; that W. H. Morris was sole judge; that the term in Saline county which had been in session on November 9 was adjourned to the 17th of that month; that on the 17th of November, 1891, William Gaslin held court in Saline county, and the trial and conviction of the plaintiff in error took place before him; that while Judge Gaslin was holding court in Saline county, Judge Morris was holding the regular term of court in Clay county, and therefore the court in Saline county had no jurisdiction at that time to try and sentence the plaintiff in error.

The general rule no doubt is that a court cannot be held at a time when there is clearly no authority to hold it, and

where the terms of court are fixed by statute so that one term closes in a particular county at a definite time and a term in another county begins, there being but one judge in the district, court cannot be held in two counties at the same time for the reason that the authority is wanting. (*Cain v. Goda*, 84 Ind., 209; *In re Millington*, 24 Kan., 214; *Dunn v. State*, 2 Ark., 229; *Garlick v. Dunn*, 42 Ala., 404; Freeman, Judgments, sec. 121; *Bates v. Gage*, 40 Cal., 183; *Smurr v. State*, 105 Ind., 125.)

In the case last cited it is said: "The question of power or authority might, perhaps, have arisen had the adjourned term been fixed at a time when the law imperatively required that the Kosciusko circuit court should be in session; but its adjourned term was not fixed at a time when that court was required to be in session. On the contrary, it was fixed at a time when the judge might rightfully have adjourned that court. This feature is a prominent one, and distinguishes the case from such cases as that of *In re Millington, supra*," and it was held that the adjourned term was held under legal authority. In *State v. Stevens*, 25 N. W. Rep. [Ia.], 777, the supreme court of Iowa held that where a trial was in progress at the time fixed for holding court in another county, the judge could adjourn the term in such other county for one week to give sufficient time to complete the trial, and the same ruling was made by that court in *State v. Peterson*, 25 N. W. Rep. [Ia.], 780. These cases, although they do not refer to, yet overrule, *Davis v. Fish*, 1 G. Greene [Ia.], 106, and *Grable v. State*, 2 G. Greene [Ia.], 559. In *State v. Leahy*, 1 Wis., 225, and *State v. Montgomery*, 8 Kan., 351, it was held, in effect, that the judge may adjourn the term of the district to a day subsequent to that fixed by law for the commencement of the regular term of court in another county in the same district.

In all the cases cited the terms were fixed by law. In this state, to avoid some of the difficulties which existed under the former system, the constitution authorizes the

Tippy v. State.

judges of the several districts to fix the terms of court in their respective districts. (Art. XVI, sec. 26.) The constitution, also to provide for the necessities of some of the counties of the state where one judge would be unable to transact the business of a county, authorizes the election of two or more judges in a district. (*State v. Stevenson*, 18 Neb., 416.)

Section 1061 of the Consolidated Statutes provides: "The judges of the district court shall, on the 1st day of January of each year, fix the time of holding terms of court in the counties composing their respective districts, during the ensuing year, and cause the same to be published throughout the district, if the same can be done without expense. The clerk of each district court shall note on the bar docket of each term the time so fixed for holding court in his county. The terms shall be so fixed as not to conflict with the time fixed by rules of the supreme court for the hearing of causes therein from said districts. The clerk of the supreme court shall, before the 1st day of January of each year, notify each district judge of the times fixed by the supreme court for the hearing of causes from his district. All terms of the district court shall be held at the county seat in the court house, or other place provided by the county board. Terms of court may be held at the same time in different counties in the same judicial district by the judge of the district court thereof, if there be more than one, and, upon request of the judge or judges of such court, any term in such district may be held by a judge of the district court of any other district of the state. When necessary, the district court sitting in any county may be continued into and held during the time fixed for holding such court in any other county within the district, or may be adjourned and held beyond such time." This section was amended in 1885 to cover the very point in controversy here, by permitting two judges, when necessary, to sit in the different counties of

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a district at the same time. This disposes of this objection.

Second—It is not seriously questioned that the evidence is sufficient to establish the guilt of the plaintiff in error, although it is intimated that the sentence is too severe.

There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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| 35 | 372 |
| 41 | 42 |
| 35 | 372 |
| 43 | 272 |
| 35 | 372 |
| 54 | 267 |
| 35 | 372 |
| 58 | 373 |
| 35 | 372 |
| 61 | 750 |

JOSEPH SUITER V. PARK NATIONAL BANK OF CHICAGO.

[FILED OCTOBER 11, 1892.]

- 1. Trial: OPENING AND CLOSING.** When, in an action on a note on the issue made by the pleadings, the plaintiff would be required to prove any fact to entitle him to recover, he has the right to open and close. If, however, the defendant in his answer admits the plaintiff's cause of action, but sets up new matter, such as usury for a defense, so that the defense would fail without proof of such new matter, the defendant is entitled to open and close.
- 2. Directing Verdict.** Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict.
- 3. Usury: PROMISSORY NOTE: BONA FIDE HOLDER: ONUS PROBANDI.** When usury is clearly established in the transaction, the burden of proof is on the person holding the instrument to show that he is a *bona fide* holder for value before maturity.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

L. W. Colby, and Pemberton & Bush, for plaintiff in error.

F. I. Foss, and Hastings & McGintie, contra.

MAXWELL, CH. J.

This action was brought in the court below upon a promissory note, as follows:

"\$4,309.38. DE WITT, NEB., January 10, 1889.

"On the 10th day of June, 1889, after date, for value received, I promise to pay to the order of Fayette I. Foss, of Crete, Neb., four thousand three hundred nine and $\frac{33}{100}$ dollars, with interest at the rate of 10 per cent per annum from maturity until paid. Negotiable and payable at the De Witt Bank at De Witt, Neb.

"No. 1377. Due 6-10-'89. JOSEPH SUITER."

Said note was endorsed as follows:

"For value received I hereby waive notice of protest and non-payment, and guarantee payment of the within note. FAYETTE I. FOSS.

"6-25. Cr. on the within note; Cr. on \$1,790.14; Cr. on \$1.40."

The note was afterwards indorsed by the cashier of the De Witt Bank and delivered to the defendant in error.

It is admitted that \$1,790 and \$1.40 have been paid on the note.

Suiter in his answer, which is very long, admits the making of the note, but alleges, in substance, that the note in question is the culmination of a long series of usurious transactions, which are set out at length, and that the plaintiff below is not a *bona fide* purchaser and holder of the note.

On the trial of the cause the court directed a verdict for the plaintiff below and the jury returned a verdict in its favor for \$2610.68, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The first objection of the plaintiff in error is that he was denied the right to open and close on the trial, and was thereby prejudiced. If the testimony in the case justi-

Sulter v. Park Natl. Bank.

fied the court in directing the jury to find a verdict for the plaintiff below there would be no error in having denied the defendant below the right to open and close, if the defendant below admitted the cause of action of the plaintiff below, so that he had nothing to prove except for the new matter to entitle him to recover, then the defendant was entitled to the opening and closing. An examination of the answer shows that the defendant below admitted the making and delivery of the note and all the facts stated in the petition, so that no proof would be required on the face of the pleadings, if the cause was submitted in that form, to entitle the plaintiff below to recover.

Judge Thompson, in his valuable work on Trials, after stating the rule adopted by this court that if, on the pleadings, the plaintiff would be required to prove any fact to entitle him to recover, he is entitled to open and close (*Rolfe v. Pilloud*, 16 Neb., 21; *Osborne v. Kline*, 18 Id., 344; *Vifquain v. Finch*, 15 Id., 505; *Mizer v. Bristol*, 30 Id., 138), says: "Where the action is upon a contract which, by its terms, liquidates the damages—as upon a promissory note, bill of exchange, bank check, bill single, policy of life or fire insurance, or any other written instrument which, by its terms, fixes the amount of the recovery—and the defendant admits the execution of the instrument, but sets up an affirmative defense, such as duress, fraud, want of jurisdiction, usury, a discharge under an insolvent debtor's act or in bankruptcy, want of title in the plaintiff, tender, or other affirmative matter of defense, or pleads a set-off or counter claim—in all such cases the plaintiff has nothing to prove in order to recover; upon a default an inquiry of damages would be unnecessary; and, therefore, the right to begin and reply is with the defendant." (Thompson on Trials, sec. 231.) He cites the cases to which the reader is referred.

The defense of usury is an affirmative one, which, being proven, the burden is on the plaintiff below to show it is a

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bona fide purchaser for value before maturity, and, therefore, entitled to protection. This alone, however, will not give it the right to open and close, as the necessity for such proof depends upon the condition that the defendant below establish the usury. Otherwise it can make no difference to him whether the plaintiff below is a purchaser for value or not, as the amount of consideration for the indorsement would be no defense in favor of the maker of the note. The defendant, therefore, was entitled to open and close.

2. There is testimony in the record in regard to the indorsement from which different minds might draw different conclusions, and it should have been submitted to the jury. (*Houck v. Gue*, 30 Neb., 113; *C., B. & Q. R. Co. v. Barnard*, 32 Id., 306.) As there must be a new trial, we do not care to comment on this testimony, or say anything which might be used to influence the jury on the next trial. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ISAAC HAGGIN V. LOVISA HAGGIN.

[FILED OCTOBER 11, 1892.]

1. Marriage: SOLEMNIZED BY UNAUTHORIZED PERSON: VALIDITY. Where a marriage is solemnized before any person professing to be a justice of the peace, minister of the gospel, or other person authorized by law to solemnize marriages, and it is consummated with the full belief, on the part of the persons so married, or either of them, that they have been lawfully joined in wedlock, the marriage will be valid, although the person before whom it was solemnized had no authority.

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| 159 | 448 |
| 86 | 875 |
| 60 | 25 |
| 35 | 375 |
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Haggin v. Haggin.

2. ———: LICENSE NOT ESSENTIAL TO VALIDITY. A license to marry is but a preliminary step in the proceedings. It takes the place of proclamation of the bans in a church as practiced under the British ecclesiastical law, and, while the solemnization of a marriage without a license would render the party performing the ceremony liable, it will not affect the validity of the marriage, if otherwise legal.
3. ———: FOREIGN LAWS: FAILURE TO PLEAD. In the absence of pleading and proof to the contrary, the laws of another state will be presumed to be like our own.
4. **Action by Wife Against Husband.** On the facts set forth in the petition, *held*, that the wife could not recover from her husband upon the cause of action therein stated, but that she was entitled to have satisfaction of a former judgment for alimony set aside and the judgment reinstated. Leave given to remit \$1,375 from judgment.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Abbott & Abbott, for plaintiff in error.

Hastings & McGintie, contra.

MAXWELL, CH. J.

This action was brought in the court below by the defendant in error against the plaintiff in error to recover damages, and on the trial the jury returned a verdict in her favor for the sum of \$1,675, upon which judgment was rendered. There is no bill of exceptions, and the only question is the sufficiency of the petition to sustain the judgment. The petition is as follows:

“The plaintiff Lovisa E. Haggin complains of the defendant Isaac Haggin and says, that on the 22d day of June, A. D. 1886, she was, as the wife of said defendant, divorced from said defendant by a decree of district court of said Saline county, Nebraska, and that the said plaintiff recovered a judgment of \$300, her alimony against said defendant, at the same time and in said court and that

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thereafter, to-wit, on or about the 17th day of August, 1886, the said defendant again proposed marriage to said plaintiff and was accepted by said plaintiff, the said defendant telling said plaintiff at the time that it would be necessary to go to the state of Kansas to have the marriage ceremony performed, by reason of having been divorced in the state of Nebraska, and that plaintiff, believing the story of the said defendant, and relying on the same, was induced to, and did go with said defendant to the said state of Kansas on the 20th day of August, A. D. 1886; and that on the 20th day of August, A. D. 1886, at the American House, in the city of Washington, in the county of Washington, in the state of Kansas, the said defendant had a marriage ceremony performed by a reputed clergyman, between said plaintiff and defendant, the said plaintiff believing the representations of said defendant made at said time, that said marriage was in accordance with the laws of the said state of Kansas and was made by a licensed clergyman and one duly empowered by the laws of the said state of Kansas to perform the said marriage rite, or ceremony, and that said marriage was on the part of said defendant made in good faith and for the purpose of living with said plaintiff as her husband, yet the said plaintiff avers that said marriage was not made in accordance with the laws of the state of Kansas, and was not performed by a licensed clergyman, nor by any one else having authority or the right to marry people, all of which said defendant well knew at the time, and that said marriage was a mock or false marriage ceremony, arranged and performed by the said defendant and the said reputed clergyman, who was a stranger to said plaintiff, for the purpose of basely deceiving said plaintiff, and to practice a fraud upon her and to induce said plaintiff, through the belief that she was the wife of said defendant, to receipt the aforesaid judgment for alimony in full, and to induce said plaintiff to go to the said state of Kansas to live, where said defendant agreed to go and live with

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the plaintiff as soon as he could arrange his business in Nebraska.

"And the plaintiff further avers, that, believing that she was the wife of said defendant, and that she was honestly and legally married to said defendant, she did, on the day following said supposed marriage, viz., the 21st day of August, A. D. 1886, come back to Saline county, Nebraska, and lived and cohabited with the said defendant as his wife and did, at the solicitation of said defendant, and without value received and without receiving any pay therefor, on or about August 20, 1886, receipt the judgment docket of the district court of Saline county, Nebraska, for the said \$300 alimony, and that at the solicitation and request of said defendant, she went, on the 24th day of September, 1886, to the said state of Kansas to live, where she remained without any means whatever except what she obtained by working out for other people, and being entirely destitute she was unable to return to Saline county, Nebraska, until the 14th day of November, 1887.

"Plaintiff further avers that said defendant now refuses to acknowledge said plaintiff as his wife, or to acknowledge the marriage ceremony as aforesaid as legal and binding, and denies that he is in any way bound to her, the said plaintiff.

"And said plaintiff further avers that she has, by reason of the fraud practiced upon her as aforesaid, in said false marriage, and by reason of the premises herein, been damaged in the sum of five thousand dollars.

"Wherefore plaintiff prays judgment against said defendant in the said sum of five thousand dollars, her damages so as aforesaid sustained, and the costs of this suit, and for such other and further relief as the nature of her case and equity may require."

The facts stated in the petition tend to show a valid marriage. In the absence of allegations to the contrary, the laws of Kansas in relation to marriage will be presumed

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to be the same as the laws of this state. (*Moses v. Comstock*, 4 Neb., 519; Story's Conf. of Laws [7th ed.], secs. 637, 637a.) Section 1407 of the Consolidated Statutes provides: "No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority in such supposed justice or minister; *Provided*, The marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage." The words "minister of the gospel" evidently were intended to include all clergymen of every denomination and faith. It will thus be seen that although the person who performed the marriage ceremony was not authorized to do so, yet if either party believed he was so authorized, the marriage will be valid. And although a license is required, yet a failure to procure the same, although it may render the person performing the ceremony liable, will not of itself affect the validity of the marriage. (2 Kent's Comm. [13th ed.], 86, note *b*; *Blackburn v. Crawford*, 3 Wall. [U. S.], 185; *Carmichael v. State*, 12 O. St., 555.)

In the case last cited the plaintiff in error, who had a wife then living, was married a second time. The second marriage had been performed by a person who had no license or authority to perform the marriage ceremony. The court sustained a conviction for bigamy against the husband. It is said: "The act of the general assembly is 'An act regulating marriages;' it does not profess to create or confer a right to marry, but only to regulate the exercise of a right, the existence of which is pre-supposed. The consequences of denying validity and effect to the exercise of the right would be so serious that an intention to do so will not be inferred, but must be clearly expressed."

In *Meister v. Moore*, 96 U. S., 76, it is said: "A statute

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may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license or publication of bans, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent; and such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. (*Catterall v. Sweetman*, 1 Rob. Ecc. [Eng.], 304; *Port v. Port*, 70 Ill., 484; *Campbell v. Gullatt*, 43 Ala., 57; 14 Am. & Eng. Encyc. of Law, 514.)

The practice in Great Britain under the ecclesiastical laws or rules appears to be the announcement in a particular church of the intended marriage, the purpose being to give all persons who may oppose the marriage an opportunity to present their objections before the marriage takes place. (Pothier on Marriage, p. 2, C. 2; 1 Bouv., Law Dict. [14th ed.], 189.) The principal object is to prevent ill-advised and clandestine marriages. The statute requiring license is designed to take the place of publication of bans, and the law as to both is directory, and the failure to observe it does not affect the validity of the marriage. The marriage, therefore, was valid and the defendant in error is the wife of the plaintiff in error, and she cannot recover damages for a void marriage. There is but little doubt that such an action may be maintained by the party injured where by means of a pretense of marriage, but without validity, the plaintiff below had sustained wrongs of the kind mentioned in the petition.

Taylor v. Kearney County.

Second—It is alleged that by means of said marriage the plaintiff below was induced to release the former judgment against the defendant below for alimony.

The petition, liberally construed, shows that this was effected through the false pretenses of the defendant below. The plaintiff below, so far as appears, is entitled to judgment for that amount with interest. The plaintiff below, therefore, has leave, within thirty days, to remit from the judgment the sum of \$1,375, in which case the judgment will be affirmed; otherwise the judgment will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FRANK TAYLOR ET AL. V. KEARNEY COUNTY.

[FILED OCTOBER 11, 1892.]

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| 35 | 381 |
| 48 | 287 |
| 35 | 381 |
| 54 | 543 |

1. **County Treasurer: FEES: COUNTIES UNDER TOWNSHIP ORGANIZATION.** Sec. 20, ch. 28, Comp. Stata., allows the county treasurer certain fees "on all moneys collected by him," etc. Sec. 87, ch. 77, provides that "The county treasurers shall be *ex-officio* county collectors of taxes within and for their respective counties, and in counties under township organization, town treasurers shall be the collectors of taxes in their respective townships," and sections 89 and 90 provide the manner in which taxes are to be collected. *Held*, That the words "on all moneys collected by him" (the county treasurer) refer solely to such taxes as he has collected from the taxpayers, and that he is not entitled to fees on moneys paid to him by township treasurers.
2. The finding and judgment upon other matters submitted are right and need not be reviewed at length.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

B. F. Smith, and Leese & Stewart, for plaintiffs in error.

J. N. Wolff, and St. Clair & McPheely, contra.

MAXWELL, CH. J.

The plaintiff in error was treasurer of Kearney county for the years 1884, 1885, 1886, and 1887, having served two terms. During his first term the county was under township organization. In making settlement with the county board a dispute arose as to the right of the plaintiff in error to retain certain sums as fees, and the county brought this action to recover an alleged balance. The cause was submitted to the court on a stipulation of facts, as follows:

“It is hereby stipulated by the parties that in 1884 the following amounts were collected:

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| Total state tax collected | \$7,305 33 |
| Of this amount the treasurer collected | 7,124 43 |
| Paid to him by township treasurer | 180 90 |
| Total county tax..... | 28,552 83 |
| Of this amount he collected..... | 28,046 82 |
| By township treasurer..... | 506 01 |
| Total school tax..... | 11,829 22 |
| Of this amount he collected..... | 11,536 83 |
| Paid him by township treasurer..... | 292 39 |
| Treasurer also collected for fines..... | 102 00 |
| Liquor license | 1,000 00 |
| Peddler's license..... | 12 50 |
| State school apportionment..... | 4,792 35 |

“Also paid to treasurer, other than tax, the following amounts:

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| County general fund, from Jensen..... | \$498 25 |
| County general fund, from Harding..... | 24 45 |
| School bond fund, village Minden..... | 720 00 |

“And it is hereby stipulated that the court shall find:

Taylor v. Kearney County.

“First, the amount of funds the treasurer is entitled to upon the taxes collected as above set forth.

“Second—As to whether the treasurer shall be entitled to charge fees upon the total amounts collected by himself and also paid to him by the township treasurer.

“Third—Whether the treasurer is entitled to charge fees upon the moneys paid to him other than taxes, and whether this should be included in the total amount of moneys collected by him.

“Fourth—Whether the treasurer shall be entitled to charge fees on school moneys, such as fines, liquor license, and peddler’s license.

“Fifth—Whether or not the treasurer is entitled to charge fees on the state school apportionment.

“Sixth—It is further stipulated and agreed that the findings of the court as to the amount of fees the treasurer is entitled for the year 1884 shall be the basis for the years 1885–6–7, and that the computation shall be made upon such findings, and a judgment entered in accordance with this stipulation, and in certain other cause now pending, involving same questions and between same parties, being suit on bond for years 1886 and 1887.”

* * * “Upon the pleadings, report of referee, the evidence, and stipulation the court finds:

“First—That treasurer is entitled to fees upon the total amount collected by him, but is not entitled to charge fees on money paid him by the township treasurer.

“Second—That the county treasurer is not entitled to fees upon money collected by others and paid to him, and such moneys should not be included in the total amount of money collected by him.

“Third—That the county treasurer is not entitled to fees on moneys paid to him received for liquor licenses, peddler’s licenses, fines, forfeiture of recognizances, belonging to the school fund collected by city treasurers and others than said county treasurer; but pursuant to provis-

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ions of section 2, subdivision 11, chapter 79, Statutes of Nebraska, and section 20, chapter 28, said Statutes of Nebraska, he is entitled to the commission of one per cent on all school moneys by him directly and actually collected and not collected by and paid over to him by others.

“Fourth—Pursuant to provisions of section 8, chapter 79, subdivision 11, Statutes of Nebraska, the county treasurer is not entitled to fees for receiving and disbursing the state school apportionment.

“The court finds there is due from defendants to plaintiff \$720.98, and its costs taxed at \$——.”

The errors assigned will be noticed in their order.

First—That the treasurer is not entitled to fees upon money paid to him by the township treasurer.

Sec. 20, ch. 28, Comp. Stats., provides: “Each county treasurer shall receive for his services the following fees: On all moneys collected by him for each fiscal year under three thousand dollars, ten per cent; for all sums over three thousand dollars and under five thousand dollars, four per cent; on all sums over five thousand dollars, two per cent. On all sums collected, percentage shall be allowed but once, and in computing the amount collected for the purpose of charging percentage, all sums, from whatever fund derived, shall be included together, except the school fund. For going to the seat of government to settle with the state treasurer and returning therefrom, a traveling fee of ten cents per mile, to be paid out of the state treasury; for advertising and selling lands for delinquent tax, an additional fee of five per cent, to be collected only in case such lands are actually sold, and then in cash, of the person buying the same; but for all other cases and services the treasurer shall be paid in the same *pro rata* from the respective funds collected by him, whether the same be in money, state, or county warrants. On school moneys by him collected he shall receive a commission of but one per cent; and in all cases where persons outside of the

state apply to the treasurer by letter to pay taxes the treasurer is authorized to charge a fee of one dollar for each tax receipt by him sent to such person."

Sec. 87, ch. 77, provides: "The county treasurers shall be *ex officio* county collectors of taxes within and for their respective counties, and in counties under township organization town treasurers shall be the collectors of taxes in their respective townships, and the treasurer of each city or village, not included within the limits of any township, shall be the collector of taxes therein."

Sec. 89 provides: "No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation under the laws of the state to attend at the treasurer's office at the county seat and pay his taxes; *Provided*, That in counties under township organization the town collector shall, as soon as he receives the tax book or books, call at least once on the person taxed at his place of residence or business, if in town, city, or village, and shall demand payment of the taxes charged to him on his property. And if any person neglect so to attend and pay his personal taxes, or shall neglect and refuse after being called upon by the town collector, until after the 1st day of January next, after such taxes become due, the treasurer, either by himself or deputy, or the sheriff of the county, when directed by distress warrant issued by said treasurer to said sheriff or the town collector, is directed to levy and collect the same, together with the penalty and costs of collection by distress and sale of personal property belonging to such person, in the manner provided by law for the levy and sale on execution, and the treasurer and town collector shall be entitled to the same fees for their services as are allowed by law for selling property under execution; *Provided*, That in case no personal property of the delinquent can be found, it shall be the duty of the treasurer and town collector, when directed so to do by order of the board of county commissioners or the board of supervisors, to com-

Taylor v. Kearney County.

mence suit by civil action in the district court of said county in the same manner as other civil actions are commenced, and prosecute the same to judgment and collection by attachment, execution, or garnishment, as the case may require, and that no property whatever shall be exempt from levy and sale under process issued on the judgment obtained in such action; and in case judgment shall be recovered, costs shall follow the judgment without regard to the amount of said judgment; *Provided, further,* That in case any person having personal property assessed, and upon which the taxes are unpaid, shall, in the opinion of the treasurer and town collector, be about to remove out of the county or in any other manner seek to put his personal property out of the reach of the treasurer or collector, it shall be the duty of the treasurer and town collector to collect such taxes by distress or attachment, as the case may require, at any time after the tax has become due, etc.

Sec. 90 authorizes the treasurer in certain cases to distrain goods, etc.

Sec. 101 provides: "If any collector shall fail to appear and make final settlement, or pay over the amount in his hands, when required in this chapter, the county clerk shall forthwith cause the bond of such collector to be put in suit, and recovery may be had thereon for the amount due from such collector as charged in his tax list, less the credits to which he may be entitled under the provisions of this chapter, and costs of suit. No act or settlement by such collector after the commencement of any such action shall avoid his liability for costs of such suit."

It will be seen that the township treasurer is to collect the taxes from the taxpayers and pay the same over to the county treasurer at a certain time, and in case he fails to perform his duty the county clerk—not the treasurer—is to bring suit upon his bond. The words "collect taxes," as used in the statute, mean to obtain payment of the same

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from the taxpayers. In most cases such payments will be made voluntarily, but the power to collect carries with it the authority to use force in the manner pointed out by law to obtain payment. The theory and intention of the law are that taxes shall be equitably and fairly distributed so that no person shall be required to pay more than his just proportion and that every one who possesses property shall pay. The securing of these taxes from taxpayers, therefore, is the collection referred to in the statute for which fees are to be allowed. But it is said there was no provision at the time indicated for the payment of fees to township treasurers. That question does not arise in this case and need not be considered. The fees allowed the county treasurer are regulated by law and he can claim nothing as fees because of an alleged failure to provide for some other officer. It is claimed, under the construction here given, the fees of the county treasurer would be so reduced as to make the office unprofitable. The remedy, however, is with the legislature and not the court.

Second—The finding and judgment of the court upon the other matters involved seem to be right and need not be reviewed at length. The judgment is right and is

AFFIRMED.

THE other judges concur.

GEORGE A. HOAGLAND V. GEORGE A. WAY ET AL.

[FILED OCTOBER 11, 1892.]

1. **District Courts: ERROR IN ENTRY OF DECREE: CORRECTION AFTER TERM.** A district court has the power to correct a mistake in the record entry of a decree at a term subsequent to that at which it was rendered so as to make the same correspond

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to the decree actually pronounced by the court, and to conform to the pleadings in the case.

2. ———: ———: ———: **WAIVER.** The taking of a stay of order of sale by the defendant is not a waiver of his right to apply to the district court, under the provisions of sec. 602 of the Code, for the correction of a mistake in the record entry of the decree.

ERROR to the district court for Franklin county. Tried below before **GASLIN, J.**

Switzler & McIntosh, and H. Whitmore, for plaintiff in error:

The trial court was without authority to change the decree at a subsequent term by petition filed after stay of execution had been entered. (*Miller v. Hyers*, 11 Neb., 474; *Sullivan v. Clark*, 12 Id., 578; *Banks v. Hitchcock*, 20 Id., 315.)

E. A. Fletcher, and M. A. Hartigan, contra.

NORVAL, J.

The facts are undisputed, and briefly stated are these: W. B. Mendenhall, one of the defendants in error, brought his action in the district court of Franklin county against George A. Way and Lydia J. Way, to foreclose a mortgage executed by them, and covering the south half of the southeast quarter of section 25, in township 2 north, range 15 west; also lots 9 and 10 in block 1 of the Academy addition to the village of Franklin. To the suit, plaintiff in error, George A. Hoagland, and the Security State Bank, N. A. Smith, and Franklin County Lumber Company were made defendants. The Security State Bank filed an answer and cross-petition praying the foreclosure of a mortgage upon the above described real estate, executed by the the Ways. George A. Hoagland also filed an answer and cross-petition asking the foreclosure of a mortgage given to him by the Ways upon said eighty-acre tract. The

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cause was submitted to the court on the 28th day of January, 1890, upon the pleadings and evidence; and on the same day the court entered a decree of foreclosure, which gave Mendenhall a prior lien for \$653.08, the Security State Bank a second lien for \$159.73, and Hoagland a third lien for \$824.60. By the decree the lots, as well as the eighty-acre tract, were ordered to be sold and the proceeds of sale directed to be brought into court and applied to the payment of the liens in the order of their priority.

On the 10th day of February, 1890, the Ways filed with the clerk of the court a written request for a stay of the order of sale. On May 9, following, the Ways filed a petition in the district court setting up that the decree, as prepared and enrolled, did not conform to the pleadings, in that it gave Hoagland a lien upon said lots 8 and 9, which constituted the homestead of the Ways, although the lots were not included in his mortgage, nor were they described in his cross-petition. That the decree as signed and enrolled was drafted, prepared, and submitted by the counsel for Mendenhall and the Security State Bank, without the same having been submitted for amendment or inspection to the counsel of the Ways, and that it was signed by the court without the knowledge of its conditions, contents, operations, and effect, and praying that said decree be corrected and modified so as to conform to the pleadings and proofs. To this petition all the parties in interest appeared and answered. The cause came on for hearing at the May term of court on the 24th day of June, 1890, and the court found that the decree was incorrect, and the same was modified and corrected to conform to the pleadings. By the modified decree Hoagland was not given a lien upon said lots 9 and 10. This is assigned for error:

Ample power is conferred upon a district court to correct or modify a judgment, at a term subsequent to that at which it was rendered, for errors or mistake of the clerk, or for any irregularity in procuring it to be entered, so as

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to make the record correspond to the judgment actually pronounced by the court, and to conform to the pleadings in the case. (Code, secs. 602, 603, 604.) It is undisputed that Hoagland's mortgage did not cover the lots above mentioned, yet by mistake, in drawing the original decree, he was given a lien upon these lots, and they were ordered to be sold and the proceeds applied in satisfaction of the same. A bare inspection of the original pleadings is sufficient to show that such mistake occurred in preparing the decree, as Hoagland in his cross-petition did not claim a lien upon said lots. Under the statute the district court had jurisdiction to correct or modify the decree at a term of court subsequent to that at which it was entered. (*Garrison v. People*, 6 Neb., 274; *Wilkins v. Wilkins*, 26 Id., 235; *Brownlee v. Davidson*, 28 Id., 785.)

It is urged that, as the execution of the original decree was stayed by the Ways, the trial court had no jurisdiction to afterward change or modify the decree. We cannot adopt this view. By section 477e of the Code it is provided that "no proceedings in error or appeal shall be allowed after such stay has been taken," etc. It is upon this provision, and certain decisions of this court that counsel for plaintiff in error rely. We are unable to perceive that the statutory provision quoted has any application to the case at bar. The object and purpose of its enactment was to deprive a suitor of the right to prosecute an appeal or petition in error to reverse the judgment after taking a stay. The Ways, after having taken the statutory stay, could not have the original decree reviewed in this court, but the filing of the request for a stay did not have the effect to deprive them of the right to apply to the district court, under the provisions of section 602 of the Code, for correction of the record entry of the decree, so that the same should conform to the pleading and the decree actually rendered. To so hold would be contrary to both the letter and spirit of the quoted section of the statute relating to the stay of executions and orders of sale.

The three cases cited in the brief of plaintiff in error do not conflict with the conclusion we have reached, as a brief examination will disclose.

In the case of *Miller v. Hyers*, 11 Neb., 474, it appears that one Jacob Lefever obtained a decree of foreclosure of a mortgage in the district court of Cass county against Jason G. Miller and wife. Within the time fixed by law the Millers filed with the clerk of the court a written request for a stay. After the expiration of the stay an order of sale was issued and placed in the hands of Hyers, as sheriff, for execution, who proceeded to advertise the mortgaged premises for sale. Miller thereupon commenced an action setting up a defense to the original cause of action in the foreclosure suit, and obtained an injunction restraining Hyers and Lefever from proceeding with the sale. The defendants set up in their answer the fact of the entry of the stay of the order of sale, and upon the hearing the district court dissolved the injunction and dismissed the suit. On error to this court it was ruled that by taking the stay Miller waived any error in the foreclosure suit. In the case before us the Ways did not attempt to urge a defense to the original suit in the application to correct the decree.

Banks v. Hitchcock, 20 Neb., 315, was an appeal from an order of the district court, denying a new trial, applied for under the provisions of section 318 of the Code, after the applicant had obtained a stay of execution. It was held that the taking of a stay was a waiver of the right to apply for a new trial. Clearly the doctrine announced in these two cases should not be further extended. The case of *Sullivan Savings Institution v. Clark*, 12 Neb., 578, was an appeal from a decree of foreclosure of a mortgage. At a subsequent term of the district court Clark, after filing a request for a stay of the order of sale, applied to the district court to correct the judgment by allowing him \$150 in addition to the sum allowed him in the decree. It was held, and we think correctly, that by taking a stay he

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waived the right to have the decree reviewed on error or appeal. We are of the opinion that the district court did not err in correcting the decree, and the decision is

AFFIRMED.

THE other judges concur.

CHARLES A. CARLSON, APPELLEE, V. ANDREW BECKMAN ET AL., APPELLANTS.

[FILED OCTOBER 11, 1892.]

1. **Bill of Exceptions: SETTLEMENT IN CASES TRIED BEFORE REFEREE.** It is the duty of a referee to settle and sign the bill of exceptions in a case tried before him. Neither the district judge nor the clerk of the district court has any authority to sign a bill of exceptions in such a case.
2. **——: MOTION TO QUASH: PRACTICE.** A motion to dismiss an appeal will not be sustained on the ground that the bill of exceptions attached to the transcript filed in this court was not properly signed. Objections to a bill of exceptions must be raised by motion to quash.
3. **Accounting: DEMAND: COSTS.** In an action for an accounting, by a principal against his agent, the defendant in his answer denied that he was indebted to plaintiff, or that he had any moneys or property belonging to him, and averred that he had accounted for all matters in controversy prior to the bringing of the suit, and also contested the case all through the trial upon the theory that nothing was due from him. It was *held*, that the plaintiff was not required to prove a demand for an accounting prior to instituting the suit, in order to entitle him to recover costs.
4. **——: COSTS.** That the judgment against the defendant in such an action is less than \$200 will not alone prevent the plaintiff from recovering his costs, since a justice of the peace has no jurisdiction of that kind of a case.

APPEAL from the district court for Burt county. Heard below before CLARKSON, J.

Sears & Thomas, for appellants.

H. H. Bowes, contra.

NORVAL, J.

This action was brought in the court below by appellee against appellants for an accounting. The cause was referred to Robert B. Daley, Esq., to take the testimony and report the same to the court with his findings of fact and conclusion of law thereon. The referee found that appellants were indebted to appellee in the sum of \$440.10. On the coming in of the report the appellee filed a motion to confirm the same, and exceptions to the report were filed by the appellants. The district court sustained the exceptions as to certain findings of the referee, and modified the report by reducing the amount due from appellants to \$189, and judgment was rendered in favor of the appellee for said sum and costs. Appellants filed a motion to tax the costs to appellee, which was overruled by the court, and an exception was taken to the ruling.

The appellee moves to dismiss the appeal because the bill of exceptions was not settled and allowed by the referee, who heard the cause. An inspection of the record shows that the bill of exceptions was never signed by the referee, but was settled by both the district judge and the clerk of the district court. It has been frequently held by this court that in a case tried before a referee the bill of exceptions should be signed by him and not by the judge. Neither the judge nor clerk had any authority to settle the bill. (*Light v. Kennard*, 10 Neb., 330; *Turner v. Turner*, 12 Id., 161, *State, ex rel. Dunterman, v. Gaslin*, 30 Id., 651.)

The objection urged against the bill of exceptions should have been raised by motion to quash and not by motion to dismiss the appeal. The failure of the referee to sign the bill is not sufficient ground for dismissing the appeal.

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As was said by LAKE, Ch. J., in *Hollenbeck v. Tarkinson*, 14 Neb., 430: "Although a bill of exceptions may possibly embody all the grounds on which a reversal of the judgment is sought, and but for which there would necessarily be an affirmance, still we regard it as the better practice, when it is desired to raise the question of its validity, to do so by a motion to quash. By pursuing this course we are relieved of the duty of examining the record to ascertain whether it may not present, as records not infrequently do, other questions for consideration than those depending on the bill of exceptions." (*Mewis v. Johnson Harvester Co.*, 5 Neb., 217; *Baldwin v. Foss*, 14 Id., 455.) The motion to dismiss is overruled.

While we could have entirely disregarded the bill of exceptions because the same was not settled by the referee, so as to make it a part of the record in the case, we have examined the testimony contained in the bill, for the purpose of ascertaining whether it sustains the judgment. While the evidence relating to some of the items involved in the accounting is conflicting, that introduced by the appellee, we are convinced, is ample to support the findings of the referee as modified by the court below.

The only question yet remaining to be considered by us is, Who should pay the costs of the action? Appellants insist that they should not, for two reasons: First, no demand was made by appellee for an accounting before he instituted the suit; second, the amount of the recovery is less than \$200. The rule is that an agent ordinarily will not be charged with the costs and expenses of a suit brought by the principal for an accounting where no demand therefor has been made upon the agent before the bringing of the action. In this case appellee introduced evidence tending to show that appellants, prior to the bringing of the suit, were called upon for an accounting and settlement, and that the request was not complied with. Besides, appellants, in their amended answer, deny that they

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were indebted to the appellee in any sum whatever, or that they have any money, notes, or property of any kind belonging to him, but aver that they have accounted to him at different times, for all the matters in controversy, just preceding the bringing of this suit. The record also shows that appellants contested the case all through the trial on the theory that nothing was due from them to appellee. Such being the condition of the answer, and the attitude of appellants on the trial, it was unnecessary to prove that a request for an accounting was made, for it is obvious if such a demand had been made, it would not have been complied with. The law does not require the performance of a useless act. Had the appellants desired to be relieved of the payment of costs, they should have shown a willingness by their pleading, and upon the trial, to render a full and complete account of their transactions with the appellee.

There is no merit in the second ground urged by appellants why they should not be charged with the costs of this case. The fact that the judgment was less than \$200 is no valid reason why appellee should not recover his costs. This being an action for an accounting growing out of fiduciary relations, a justice of the peace had no jurisdiction of the case. The district courts alone have original jurisdiction of this kind of an action, therefore the party who shall pay the costs is not determined by the amount of the recovery. The judgment of the district court is

AFFIRMED.

THE other judges concur.

W. S. WEIR v. S. J. ANTHONY.

[FILED OCTOBER 11, 1892.]

Contract of Guaranty: ASSIGNMENT: RIGHT OF ASSIGNEE TO MAINTAIN ACTION. Under the statute of this state, a contract of guaranty is assignable, and the assignee may maintain an action thereon in his own name.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Prickett & Pope, for plaintiff in error, cited, as to right of assignee to sue on contract of guaranty in his own name: *Craig v. Parkis*, 40 N. Y., 181; *Stillman v. Northrup*, 17 N. E. Rep. [N. Y.], 379; *Waldron v. Haring*, 28 Mich., 493; *Bank v. Carpenter*, 41 Ia., 518.

J. L. Epperson, and *Charles H. Epperson*, contra, cited: *Brandt*, Suretyship, secs. 35, 36, 97; 3 Kent, Comm., 183; 2 Parsons, Contracts, 3; 9 Am. & Eng. Enc. Law, 76; 1 Bouv., Law Dic., 645; 4 Lawson, Rights, Remedies, & Pr., 2737; 2 Daniels, Neg. Inst., sec. 1774; Story, Prom. Notes, sec. 484; *Smith v. Dickinson*, 6 Humph. [Tenn.], 261; *Smith v. Starr*, 4 Hun [N. Y.], 123; *Watson v. McLaren*, 19 Wend. [N. Y.], 559; *Walsh v. Bailie*, 10 Johns. [N. Y.], 80; *Bank v. Brady*, 3 McLean [U. S.], 269; *Mellen v. Whipple*, 1 Gray [Mass.], 317; *Colburn v. Phillips*, 13 Id., 69; *Blymire v. Boistle*, 6 Watts [Pa.], 182; *Fortune v. Brazier*, 10 Ala., 793; *Grant v. Naylor*, 4 Cranch [U. S.], 224; *McDoal v. Yeomans*, 8 Watts [Pa.], 361; *Ekel v. Snevily*, 3 Watts & S. [Pa.], 272; *Ten Eyck v. Brown*, 4 Chand. [Wis.], 151; *Sanford v. Norton*, 14 Vt., 233.

NORVAL, J.

This action was brought by W. S. Weir against S. J. Anthony in the county court of Clay county, upon a writ-

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ten contract of guaranty made by the defendant to recover the amount of three certain promissory notes executed by one William Watson, payable to the order of the Weir Plow Company, and transferred to the plaintiff.

The petition alleges, substantially, that William Watson, on the 7th day of September, 1886, executed and delivered to the Weir Plow Company his three promissory notes of that date, payable to its order; two for the sum of \$132.41 each, with ten per cent interest from November 1, 1886, due December 15, 1886, and January 15, 1887, respectively, and the other note for the sum of \$166.10, payable November 1, 1887, with interest at ten per cent from June 1, 1887; that no payments have been made upon said notes, except the sum of \$26 on January 12, 1887, \$5 on January 29, 1887, and \$53.95 on June 24, 1887. The petition further alleges: "That said notes were given for goods bought of said Weir Plow Company by Wm. Watson subsequent to the 20th day of January, 1886, and during that year; that on the said 20th day of January, 1886, said defendant executed and delivered to plaintiff his special promise in writing to answer for the debt of said Wm. Watson, as evidenced by the above promissory notes, in words and figures as follows:

"GUARANTY.

"In consideration of the credit which Weir Plow Company may extend to Wm. Watson, of Fairfield, Neb., upon the within contract, and of one dollar to me in hand paid by said Weir Plow Company, the receipt whereof is hereby acknowledged, I hereby guarantee to said Weir Plow Company the complete fulfillment of said contract upon the part of said Wm. Watson, and payment at maturity of all notes and accounts made by said Wm. Watson in pursuance of said contract, including also payment of all goods that said Wm. Watson may order of said Weir Plow Company subsequent to this date and during the

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year 1886. I further guarantee payment to said Weir Plow Company of all notes at maturity that may be taken by them in full or part payment of the indebtedness of said Wm. Watson, under this contract, and also payment of all notes taken by them in payment of any indebtedness of said Wm. Watson to said Weir Plow Company for implements ordered by him subsequent to this date and during the year 1886, whether said notes are the notes of Wm. Watson or other persons. I hereby waive all notices to me, as guarantor, of default in payment of any of said notes or accounts. (Signed) S. J. ANTHONY.'

"The plaintiff alleges that in consideration of said guarantee, and relying upon the same, the Weir Plow Company afterwards sold said Wm. Watson implements as per bills hereto attached marked Exhibits 'A,' 'B,' and 'C,' and on September 7, 1886, took said Wm. Watson's notes, as above mentioned, for balance due for said goods and implements so sold and delivered on the faith and credit of the said guarantee of defendant. When said notes became due they were duly presented for payment to Wm. Watson and refused, except as above set forth, and Mr. S. J. Anthony, the defendant, was then promptly requested to pay the same. No part of said notes have been paid and there is now due from the defendant to the plaintiff the sum of \$600.

"The plaintiff further alleges that on the —— day of ——, 188—, the said Weir Plow Company, for valuable consideration, duly transferred and delivered to the plaintiff the above mentioned promissory notes and guaranty as follows:

"Without recourse pay to the order of W. S. Weir.

"WEIR PLOW COMPANY,

"Per W. M. GOLBROTH,

"Ass't Cashier."

To the petition the defendant filed a demurrer, alleging two grounds:

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First—That the plaintiff had no legal capacity to sue.

Second—That the petition does not state facts sufficient to constitute a cause of action.

The demurrer was sustained by the county court and the action dismissed. Plaintiff prosecuted a petition in error to the district court, where the decision of the county court was affirmed.

The only point presented for the consideration of this court is this: Is the contract of guaranty set out in the petition assignable, so as to vest the right to bring the action thereon in the name of the assignee?

It is argued by counsel for defendant that, as the guaranty sued on was made to the Weir Plow Company, the contract was personal to the party to whom it was made, and therefore it was neither negotiable nor assignable. At common law, a contract of guaranty could not be assigned so as to enable the assignee to enforce the same in his own name. But under our statute this rule is changed. Sections 29 and 30 of the Code of Civil Procedure are as follows:

“Sec. 29. Every action must be prosecuted in the name of the real party in interest,” etc.

“Sec. 30. The assignee of a thing in action may maintain an action thereon in his own name and behalf without the name of the assignor.”

Under these provisions, where a contract of guaranty is transferred by assignment, the assignee is vested with power to sue and recover upon it in his own name. Plaintiff is the real party in interest and is the proper and only party who can maintain the suit. (*Mills v. Murry*, 1 Neb., 327; *Hoagland v. Van Etten*, 23 Id., 462; *First Natl. Bank of Dubuque v. Carpenter*, 41 Ia., 518; *Lemmon v. Strong*, 59 Conn., 448; *Craig v. Parkis*, 40 N. Y., 181; *Stillman v. Northrup*, 109 Id., 473; *Everson v. Gere*, 122 Id., 290; *Waldron v. Harring*, 28 Mich., 493.)

The authorities cited by counsel for defendant are not

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applicable, for the reason that they are from states having statutes unlike ours and where the common law rule as to the assignability of a contract of guaranty prevails. It follows that the demurrer to the petition should have been overruled. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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ROBERT HENDRESCHKE V. HARVARD HIGH SCHOOL
DISTRICT.

[FILED OCTOBER 11, 1892.]

1. **Special Tribunal: JURISDICTION EXCLUSIVE.** Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act.
2. **County Superintendent: JURISDICTION: SCHOOL DISTRICTS.** The county superintendent in this state has exclusive original jurisdiction in all matters pertaining to the division of counties into school districts.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd, and *T. A. Barbour*, contra.

POST, J.

The only question presented by the record in this case is that of the original jurisdiction of the district court as

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a court of equity to create new school districts, or by decree to change the boundaries of existing ones. The district court resolved this question against the plaintiff in error by an order sustaining a demurrer to his petition. We fully agree with the district court that under the provisions of our school law, section 4, subdivision 1, chapter 79, Compiled Statutes, the county superintendent of schools has exclusive original jurisdiction of all matters pertaining to the division of counties into school districts. The rule is well settled that where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to that subject, the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested. (Hawes, Jurisdiction, 36; *Macklot v. Davenport*, 17 Ia., 379; *Dodson v. Scrags*, 47 Mo., 285.) Such in effect has been the holding of this court. (*State v. Palmer*, 18 Neb., 644; *State v. C., St. P., M. & O. R. Co.*, 19 Id., 476; *Cowles v. School District*, 23 Id., 655; *State v. Clary*, 25 Id., 403.) The judgment of the district court is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CUSTER COUNTY AGRICULTURAL SOCIETY AND LIVE STOCK EXCHANGE, V. JOHN ROBINSON ET AL.

[FILED OCTOBER 11, 1892.]

1. Constitution: LAWS: TITLE OF ACT. The provision of section 11, article 3, of the constitution, that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," has no application to laws in force at the time of the adoption thereof.

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2. ———: **SPECIAL LEGISLATION: AGRICULTURAL SOCIETIES.** The provision of section 12, chapter 2, Compiled Statutes, entitled "Agriculture," for the payment to agricultural societies complying with the provisions thereof, of a sum equal to three cents for each inhabitant from the county general fund of the several counties, does not conflict with the provisions of section 15, article 3, of the constitution.
3. ———: **LEGISLATIVE POWER.** The legislature has authority under the constitution to determine what purposes are matters of public concern, so as to render taxation therefor admissible.
4. **Agricultural Societies: DEFINED.** Agricultural societies are not corporations within the ordinary meaning of the term, but rather agencies adopted by the state for the purpose of promoting the interests of agriculture and manufacturing.
5. ———: **AID BY TAXATION: MANDAMUS TO COUNTY BOARD.** In a *mandamus* proceeding to compel the board of supervisors to include in the estimate of expenses for the current year the amount payable to an agricultural society by provision of statute, the fact that another society in the same county has complied with the conditions necessary to entitle it to demand payment from the county is no defense where it does not appear that such society is making any claim upon the county for funds under the provisions of the statute.

ORIGINAL application for *mandamus*.

J. S. Kirkpatrick, and *Sullivan & Gutterson*, for relator.

E. P. Campbell, County Attorney, *contra*.

POST, J.

This is an original application for a writ of *mandamus* to compel the respondents, who comprise the board of supervisors of Custer county, to include in their estimate of expenses for the year 1892 an amount sufficient to pay to the relator three cents for each inhabitant of said county for the years 1891 and 1892 in accordance with the provisions of section 12, chapter 2, Compiled Statutes, entitled "Agriculture." It appears from the allegations of the petition, none of which are denied, that the relator is an agri-

cultural society duly and legally organized in conformity with the statute in question, and that it has complied with all the requirements of law to entitle it to demand from the county the sum of money provided for by the section above referred to. The first objection raised by the respondents is that the law is unconstitutional for the reason that the title of the original act is not sufficiently comprehensive to include the section under consideration, which provides for payment out of the county general fund to county agricultural societies complying with the requirement thereof, a sum in each year equal to three cents for each inhabitant of the several counties. The act in question was passed by the territorial legislature in the year 1866 and at the time of its passage contained the features which it is now claimed render it unconstitutional and void. Although it has been amended frequently it is conceded that the amendments are not material to the questions raised and need not for that reason be noticed. The provisions of the constitution with reference to titles of acts have no application to laws then existing. It was expressly provided by the constitution of 1866, section 1, article 11, that laws then in force should remain in force until repealed or amended by the legislature, and the same provision is found in section 1, article 16, of our present constitution.

Second—It is urged as an objection to the law that it contravenes section 15, article 3, of the constitution, which provides that “The legislature shall not pass local or special laws * * * granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever.” We are unable to perceive wherein the law is susceptible of such a construction. The limitation contained in the above section of the constitution was evidently intended as a remedy for the evil of special legislation and cannot by any reasonable or natural construction be held to apply to the act under consid-

eration. It has been frequently held by this court that a law which is general and uniform throughout the state, and operates alike upon all persons or localities which come within the relations and circumstances provided for, is not objectionable to the constitution or wanting in uniformity. (*State v. Berka*, 20 Neb., 375; *Lancaster Co. v. Trimble*, 33 Id., 121.) The act in question is certainly uniform in its operation, and applicable alike to all counties in the state, and is in no sense a special law within the meaning of the constitution.

Third—As a general rule, under the constitution the legislature is invested with authority to determine what purposes are matters of public concern, so as to render taxation admissible. (Cooley, Taxation, 103.)

There has been no reason suggested in the argument, and none occurs to us, for excluding agricultural and horticultural exhibitions from the list of public enterprises for which taxes may be imposed. It is provided by section 13 of the act that premiums shall be awarded for improvement of the soil, crops, tillage, manures, implements, stock, articles of domestic industry, and such other articles, productions, and improvements as they (the society) may deem proper, and best calculated to promote the agricultural and manufacturing interests of the county and state. Agricultural societies are not corporations in the ordinary sense of the term, but rather agencies of the state created for the purpose of assisting in promoting our most important industry. Among the general purposes for which taxes are imposed, Adam Smith enumerates: 1. Public works and institutions for facilitating the commerce of society. 2. Institutions for the education of youth. 3. Institutions for the instruction of people of all ages. Doctor Wayland, in his work on the same subject, includes among the purposes for which public funds may be expended, expenses for maintaining education, which he classifies as common and scientific. (See also Cooley on Taxation, 106 and 107,

and cases cited.) The purpose for which the money is appropriated is, when viewed in the light of authority, clearly one of public utility, and, therefore, permissible under the constitution.

Fourth—A further objection to the writ is raised in the answer, viz., that another society, to-wit, The Callaway Agricultural Society, is also duly organized and has complied with all the requirements of statute to entitle it to demand payment of the money provided by law. There is no merit in this contention, since it does not appear that the Callaway Agricultural Society held an exhibition in either of the years in question, or that it makes any claim to contribution from the treasury of the county. It is admitted that the amount due relator for the year 1891, was included in the estimate for that year, but that respondents refused to allow the claim or draw a warrant therefor. It is further admitted that the general fund levy for the year 1891 has been exhausted in the payment of other legitimate expenses of the county, and that relator's claim for that year must be paid out of the levy for subsequent years. That claim is a valid and subsisting indebtedness of the county and should have been included in the estimate for 1892, together with the amount payable to relator in that year. The relator is entitled to the relief sought, and a peremptory writ of *mandamus* is

ALLOWED.

THE other judges concur.

FERDINAND STREITZ, APPELLANT, V. A. J. FREDERICK
HARTMAN ET AL., APPELLEES.

[FILED OCTOBER 13, 1892.]

1. **Cumbering Record: Costs.** Where unnecessary papers are included in the transcript, as the original petition where there is an amended one, the summons and return to the same, together with motions and demurrers to the petition where no point is made upon such pleadings or papers, the costs of the same will be taxed to the party at fault.
2. **Trusts: RIGHTS OF TRUSTEE.** The members of an association joined together and purchased a tract of land near O., the title being taken in the name of a trustee. The land was platted into eighty-four lots, seven acres being reserved for the trustee. One lot was given to J. B. for services, and the other lots were conveyed to the several shareholders, who each received his deed in full satisfaction of the trust. *Held*, That a grantee from a shareholder could not open up the trust and require the trustee to account and convey to him land not included in his purchase, and that there was no equity in his petition.
3. ———: **LACHES: ENFORCEMENT OF STALE CLAIMS.** It is not the policy of the law to enforce stale claims which are asserted after the witnesses are dispersed or dead.
4. **Statute of Limitations.** The action is barred by the statute of limitations.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Switzler & McIntosh, for appellant.

Edward W. Simeral, Mahoney, Minahan & Smyth,
Congdon, Clarkson & Hunt, and A. J. Poppleton, contra.

MAXWELL, CH. J.

It is alleged in the petition, in substance, that on the 10th day of May, 1857, there was organized at Dubuque,

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Iowa, an association known as the Homestead Society, for the purpose of procuring for the members thereof a quantity of real estate at or near Omaha; that in pursuance of the purpose of the organization, forty acres of land were purchased and the title to the same taken in the name of John George Hartman, trustee for the several shareholders; that Hartman took immediate possession of the land and laid the same out as an addition to Omaha; and a plat of said addition was duly filed in the county clerk's office; that said addition was divided into eighty-four lots, which were to be given to the members of said association according to the interest or share of each member; that by the terms of the articles of association each member was entitled to recover one full lot and a fraction of a lot for each fraction of a share possessed by him; that there was a mistake in surveying and platting said ground, by reason of which the point of beginning the survey was placed thirty-five feet north and seventeen and one-half feet east of the actual corner, hence on the opposite side of the tract, the survey overlapped upon lands owned by others from seventeen and one-half to thirty-five feet; that by reason of said mistake there still remains, unappropriated, a strip of ground (giving boundaries) about 980 feet in length by thirty-five in width; that no part of said strip has been conveyed by Hartman as trustee; that the plaintiff owns lots 1, 2, 3, 4, and 23 in said addition; that certain lots named border on the overlap, and hence are short from seventeen and one-half to thirty-five feet in length, and the plaintiff asks to be compensated for said deficiency out of the unappropriated strip above referred to; that the last named lots were conveyed to the original shareholders as full lots, but by said mistake the grantees did not obtain their full share; that the plaintiff has succeeded to the rights of said grantees.

The plaintiff then sets out what he claims to be the interest of some of the lot-owners and says: "That by reason

Strelitz v. Hartman.

of the shortage in the lots as above set forth there has been an inequitable distribution of said property; that whereas nearly all of the original shareholders have received full lots, this plaintiff and those under whom he claims received only fractions thereof as above stated, and consequently he has been greatly damaged in his said rights, which he alleges should be made good out of the unused and unsold strip referred to above.

“The plaintiff prays the court that an accounting may be had of the amount of land due him by virtue of the facts as hereinbefore stated and set forth, and that whenever the same is ascertained, the said trustee be decreed to convey to him as much of said strip of land as would reimburse him for said loss and shortage; that his title to the same be quieted as against the other defendants and their successors or grantees, and for such further relief as in equity may seem just and proper.”

The defendant John G. Hartman, is dead, but the action proceeded against his sons, who answered, in substance, that they admit the organization of the association, the trust character of the land purchased, and allege that the land was divided into eighty-four lots and conveyances duly made to the several shareholders, eighty-three in number, and the eighty-fourth lot was conveyed to William Banner for services rendered the association; that the strip of land in controversy is not in their possession, but is possessed by other parties who have acquired a title by adverse possession; that seven acres of the land were donated to John G. Hartman for his services in the discharge of the trust; that the plaintiff was not a *cestui que trust* of said Hartman and has no claim upon him whatever; that three of the shareholders have not come forward to claim a share in said land; that each grantee under whom the plaintiff claims title “took said lots from the trustee in full of all claims and demands which he had against said trustee (Hartman), and that therefore no

trust relation existed between said trustee and any of his said grantees." There is also the defense of adverse possession for more than ten years.

It is unnecessary to set out the substance of the other pleadings.

On the trial of the cause the court found that, as to the Hartmans, the amended petition fails to show any equity in behalf of the plaintiff, and as to the other defendants fails to state a cause of action. The court therefore found the issues in favor of the defendants and dismissed the action.

In the record we find the original petition, although no point is made on it. There is also the summons and return, although the defendants appeared in the case. Then there is an amended petition, etc. These unnecessary papers tend to incumber the record and consume the time of the court, as in order to ascertain what questions are in issue the pleadings are read in their order, and no time should be wasted over papers not properly in the case; and the costs of such papers will, in all cases, be taxed to the party at fault.

Second—The judgment of the court below is clearly right.

Where a trustee conveys to a *cestui que trust* in satisfaction of the trust and he is satisfied, being of full age and capable of contracting, his grantee cannot bring an action upon the trust agreement—in effect, to open up the trust and for a redistribution.

Third—It is very clear also that as each conveyance was made, the person receiving the same accepted it in full of his share of the trust estate, and the trustee was thereupon, in effect as to that trust, discharged, and as to each, the statute of limitations began to run from that time.

It is not the policy of the law to keep alive stale claims, and enforce them after many of the witnesses are gone, no one knows where, or are dead. This trust was undertaken

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Capital Natl. Bank v. Williams.

nearly thirty-five years ago and many of the deeds to the shareholders were made but a few years short of that time. No attempt was made within a reasonable time to question the trust, and it has never, so far as appears, been questioned by any of the original shareholders. The plaintiff appears to be a speculator in the claims and fails to show any equity in his petition. He purchased certain lots. The size of such lots was well known or could easily have been ascertained. The mistake, which is admitted, had been made a third of a century ago and the plaintiff is not in a condition to rectify it, nor indeed could all the *cestuis que trust* together do so. The judgment is

AFFIRMED.

THE other judges concur.

85 410
48 766

CAPITAL NATIONAL BANK, APPELLANT, V. JOHN W.
WILLIAMS ET AL., APPELLEES.

[FILED OCTOBER 13, 1892.]

1. **Mortgage: PROMISSORY NOTE: FORGED SIGNATURE: WEIGHT OF EVIDENCE.** In an action to foreclose a mortgage upon real estate, the jury found that the purported maker did not sign either the note or mortgage, and the verdict being set aside, substantially the same findings were made by the trial court. A number of genuine signatures of the defendant were submitted to the jury and court for a comparison of handwriting, and such signatures are preserved in the record; but the proof fails to reach that degree of certainty to show that the judgment of the court below is clearly wrong.
2. ———: **FORGERY: CANCELLATION OF LIEN.** *Held,* That the evidence tended to establish the fact that the mortgage was a forgery, and that a judgment canceling the apparent lien caused by such mortgage on the real estate was right.

APPEAL from the district court for Fillmore county.
Heard below before MORRIS, J.

John P. Maule, and Charles H. Sloan, for appellant.

Ong & Jensen, contra.

MAXWELL, CH. J.

This action was brought to foreclose a mortgage upon real estate. The note which the alleged mortgage was given to secure is as follows:

“\$790.30. FAIRMONT, NEB., January 19, 1887.

“January 19, 1890, after date, for value received, I, or we, promise to pay I. B. Chase, or order, seven hundred and ninety and $\frac{30}{100}$ dollars at First National Bank, Fairmont, Neb., with interest at ten per cent per annum after date. JOHN W. WILLIAMS.”

The defendant filed an answer to the petition as follows:

“Now comes the defendant, John W. Williams and for a further and more specific answer * * * says that he never executed the note described in plaintiff's petition, nor the mortgage purporting to secure the same, upon the land therein described and which he is informed and believes has been spread upon the records in the office of the recorder of deeds in the county of Fillmore, in the state of Nebraska, and never authorized any person to sign said note or said mortgage for him, and never acknowledged before any officer authorized by law to take acknowledgments of deeds or mortgages the execution thereof, and never delivered such a note or mortgage, or either of them, to I. B. Chase, or any other person or corporation whatsoever.

* * * “That at the time said note and mortgage purported to have been executed he was living with his family, Sarah A. Williams and five children, upon said

land, and was occupying the same as a homestead, and had been so occupying the same for several years prior thereto, and has occupied the said land as aforesaid since the time the said mortgage purports to have been executed, and up to the 1st day of March, A. D. 1890, and that said mortgage does not purport to be executed or acknowledged by the said Sarah A. Williams, wife of this defendant, and would, therefore, in any event be void. He therefore prays that the petition be dismissed on final hearing and that this defendant recover his costs."

To this answer the plaintiff filed a reply as follows:

"Plaintiff says that when said note and mortgage were by said defendant executed and delivered, said premises so mortgaged were worth \$6,000, or above all incumbrances the sum of \$3,800; that as a matter of fact that said premises have been recently heretofore sold by said defendant, to-wit, on or about the — day of —, A. D. 1889, to one Benj. Le Fevre, co-defendant herein, for the sum of \$5,500, or for the sum of \$3,300 above all incumbrances; that from said \$3,300 there has been an amount sufficient to pay plaintiff's demand deposited in the Citizens Bank of Geneva, and the same is there still on deposit, subject to the outcome of this suit, and that after the deduction of the amount of said deposit for said purpose from said \$3,300 there remains more than the sum of \$2,000, claimed by the defendant as exemptions under the laws of the state of Nebraska, if the court should find that defendant is entitled to any exemption."

On the trial of the cause special questions were submitted to the jury: First, Did Williams sign the note in question? and second, Did he sign the mortgage sought to be foreclosed? To both of these questions the jury answered "No."

A motion was filed on behalf of plaintiff to set aside the verdict: First, because the jury was impaneled at the request of the court, and second, because the verdict was

against the weight of evidence. The motion was thereupon sustained and the verdict set aside.

The cause was then submitted to the court upon the evidence, which found the issues in favor of the defendant, and that the mortgage was a forgery, fraudulent, and canceled the same and dismissed the action.

Williams denies absolutely the making of either the note or mortgage. The note purporting to be signed by Williams was submitted to the jury, and ten other instruments which contained his genuine signature, to enable the court and jury to compare the signature on the note with his signatures admitted to be genuine. The originals are before us. It is true that the signature on the note is very similar to the signatures on two of the papers which are admitted to contain his genuine signature. The proof, however, fails to show that the finding and judgment of the court are clearly wrong and therefore cannot be disturbed.

Second—The original mortgage was not produced. The existence of a genuine mortgage was denied. There was a failure to account for the original in a satisfactory manner and the proof tends to show that the mortgage never had any legal existence. The purported note and mortgage were transferred to the plaintiff by an insolvent bank in Fairmont as collateral security, but the plaintiff possesses no greater rights than its assignor.

It is unnecessary to consider the other questions, as the mortgage has no validity. The judgment of the district court is

AFFIRMED.

THE other judges concur.

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| 45 | 719 |

**HENRY A. HOMAN ET AL. V. MARIA HELLMAN,
EXECUTRIX.**

[FILED OCTOBER 26, 1892.]

1. **Action to Quiet Title: AMENDING PETITION TO STATE CAUSE OF ACTION IN EJECTMENT.** An action was brought by a party out of possession to quiet and confirm his title to real estate. In his answer the defendant made the objection that the action would not lie, and the court sustained the objection; thereupon the court permitted the plaintiff, upon payment of all costs, to amend his petition to state a cause of action in ejectment *Held*, No error.
2. **Practice: AMENDMENT OF PLEADINGS.** So long as the subject of the action remains substantially the same, an amendment may be permitted to adapt the relief to the facts relied upon for a recovery.
3. **Judgments: MODIFICATION WITHOUT NOTICE VOID.** A decree foreclosing a mortgage upon real estate is a final judgment upon which the parties to the suit may rely, and any change therein or modification thereof without lawful notice, particularly after the term at which it was rendered, is null and void.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Hall & McCulloch, for plaintiffs in error:

Where decree has once been entered, no supplemental order can be made without notice, and the findings in the original decree are conclusive upon the parties thereto. (*Mulvey v. Carpenter*, 78 Ill., 586; *Blake v. McMurtry*, 25 Neb., 291; *Symns v. Noxon*, 29 Id., 404.)

H. D. Estabrook, and *Irvine & Clapp*, contra:

The amendment of the petition did not change the object of the action, which was the enforcement of plaintiffs' right to the land. It has been the practice of this court to permit such amendment. (*McKeighan v. Hopkins*, 14 Neb.,

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361; S. C., 19 Id., 33; *Gregory v. Lancaster County Bank*, 16 Neb., 411.) The proceedings on which supplemental order was obtained in foreclosure suit were regular: First—Because the court still retained jurisdiction of the case. Decree of foreclosure is not such a final decree as removes the case from the docket. Court retains jurisdiction to carry decree into effect, as well as to determine rights reserved, and complete the foreclosure in accordance with those rights. (*Brinckerhoff v. Thalhimer*, 2 Johns. Ch. [N. Y.], 486; *Coffey v. Coffey*, 16 Ill, 141; *Sessions v. Peay*, 23 Ark., 39; *Suffern v. Johnson*, 1 Paige [N. Y.], 450; *Boone v. Clark*, 21 N. E. Rep. [Ill.], 850.) Second—Court may order execution of deed, already ordered years before, where the former order was not complied with. (*Lamb v. Sherman*, 19 Neb., 688.) Third—The mortgagee is shown affirmatively to have received notice of the proceeding. Fourth—The court was one of general jurisdiction, and it is presumed all acts were done necessary to confer jurisdiction. (*Hilton v. Bachman*, 24 Neb., 490; *Seward v. Didier*, 16 Id., 58; *Hastings Sch. Dist. v. Caldwell*, 16 Id., 72; *Saxon v. Cain*, 19 Id., 491; *O'Brien v. Gaslin*, 20 Id., 347.)

MAXWELL, CH. J.

In March, 1887, the defendant in error brought an action in the district court of Douglas county against the plaintiffs in error to remove a cloud and quiet the title to the northwest quarter of the northeast quarter of section 34, township 16 north, of range 13 east, in Douglas county. An amended answer was filed by the defendant below in which he alleged that the plaintiff below was not in possession of the land, and therefore could not maintain an action to quiet title, and the court so held. The plaintiff below thereupon asked leave to amend his petition so as to bring the action in ejectment. This leave was granted upon the payment of all costs; and this is the first error complained of.

There was no error in permitting the amendment. In *McKeighan v. Hopkins*, 14 Neb., 361, and the same case, 19 Neb., 33, an action was brought in ejectment and an amendment permitted to make the action one to redeem. To the same effect, *Gregory v. Lancaster Co. Bank*, 16 Neb., 411. These cases were decided upon the theory that so long as the action relates to the same thing the form may be changed so as to adapt the relief to the facts proved. It is true that under the common law and chancery practice such an amendment would not have been allowed, but under the Code, so long as the identity of the subject of action remains substantially the same, the form of the remedy may be changed. (*Robinson v. Willoughby*, 67 N. Car., 84; *Bullard v. Johnson*, 65 Id., 436; *Roberts v. Swearingen*, 8 Neb., 363; *Caldwell v. Meshew*, 13 S. W. Rep. [Ark.], 761; *Barnes v. Hekla Ins. Co.*, 39 N. W. Rep. [Ia.], 122; *Esch v. Home Ins. Co.*, 43 Id. 229; *Argersinger v. Levor*, 54 Hun [N. Y.], 613; *Gourley v. St. L., etc., Ry. Co.*, 35 Mo. App., 87; Maxw., Code Pl., 578.)

Second—It appears from the record that in August, 1857, an instrument was executed, purporting to be a deed of the Florence Land Company for the northeast quarter of section No. 34, in township 16 north, of range 13 east, containing 160 acres, which was pre-empted by John Seltzer, on which was laid land warrant No. 30,908 in the name of John S. Mink, and by the said John Seltzer conveyed to the Florence Land Company. This deed is signed by Philip C. Chapman and attested by James C. Mitchell, and is acknowledged. This deed, although absolute in form, was, in fact, a mortgage, and in February, 1860, Parker brought an action against the Florence Land Company to have the deed declared a mortgage and foreclosed; and a decree was entered as prayed for in the petition, and a deed executed to Parker on the 20th of July, 1860, by one J. G. Chapman as master in chancery.

On the 26th of March, 1858, the Florence Land Com-

Homan v. Hellman.

pany gave a promissory note to James G. Megeath, and in October, 1859, he brought suit thereon, and recovered a judgment July 6, 1860; and on the 22d of September, 1863, an execution was duly issued on the judgment, and the land in controversy sold to Charles H. Brown, who afterwards conveyed to Joseph Megeath, who conveyed to Homan & Bingham.

In 1868 Parker sold 160 acres of land, including that in controversy, to George W. Forbes, who gave a purchase money mortgage to Parker. In May, 1876, Parker brought an action to foreclose the mortgage, and Lucinda Randolph, who had purchased the forty acres in controversy, was made a defendant with some twenty others, the general allegation as to their interests being as follows:

"The said plaintiff also says that the said defendant Forbes has not paid the taxes levied and assessed against the said premises, but has suffered the same to become delinquent, and that the said premises, or a portion thereof, have been sold for taxes.

"The said plaintiff also says that the other defendants herein named have, or claim, some interest in, or lien upon, the said premises, or some portion thereof, either by purchase or by mortgage or judgment liens, or otherwise, but of the exact nature or extent of the said interest or liens, the said plaintiff is not advised, but plaintiff alleges that the said interests or liens of whatever kind or nature were all acquired subsequent to the execution and recording of the said mortgage to the said plaintiff hereinbefore described, and are subject thereto."

In its decree the court found that Parker had redeemed the northeast quarter of the southwest quarter of section 34, and paid therefor the sum of \$184.32, and found the amount due on the mortgage to be the sum of \$2,966.67. The court, after directing the sale of a portion of the mortgaged premises, rendered a decree as follows:

"And the court further finds that since the execution

of the said mortgage the said Forbes has suffered a portion of the said lands in said petition described, to-wit, the northwest quarter of the northeast quarter of the said section 34, to be sold for taxes, and that the time for the redemption of the same having expired, a deed was made to the purchaser at said tax sale for said lands by the county treasurer of said county, and that the said purchaser now holds the tax title to said lands.

“And the court further finds that since the execution of said mortgage the said Forbes has sold and conveyed to different purchasers, and at different times, portions of the said lands in said mortgage described, designating the same as lots in said Forbes’s subdivision of the southwest quarter of said section 34, and that the said portions so sold were designated and conveyed in the following order to-wit:

“First—Lots 5 and 6 in said subdivision, to A. Rosenberg, March 24, 1869.

“Second—Lot 4 in said subdivision, to Darius Pearce, April 5, 1869.

“Third—Lot 3 in said subdivision, to John H. Burnett, November 16, 1871.

“Fourth—Lot 8 in said subdivision, to Mortimer A. McCoy, August 14, 1872.

“Fifth—Lot 7 in said subdivision, to J. W. Dorsey, March 8, 1873.

And the said Forbes still holds the legal title to lots 1 and 2 in said subdivision, and also to the northeast quarter of the southwest quarter of said section 34.

“It is therefore ordered and adjudged that the said defendant George W. Forbes do, within twenty days from this date, pay to the said plaintiff the said sum of \$2,966.67, the amount so found due upon said note and mortgage herein, and the further sum of \$248.32, the sums paid to redeem said lands from sales for taxes as aforesaid, with interest on all of said sums from the first day of this term and the costs of this suit, and that in default thereof the

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said land in the petition be sold by the sheriff at the time of said county of Douglas, and that in making said sale the said sheriff observe the subdivision into lots which has been made by the said Forbes of the northwest quarter of the southwest quarter of said section 34, township 16, range 13 east, and that the sale of said lots and lands be made in the following order:

“First—The northeast quarter of the southwest quarter of section 34, township 16, range 13, and lots 1 and 2 of Forbes’s subdivision of the southwest quarter of said section 34, township 16, range 13, and if the proceeds of the sale of said portions of said lands shall be insufficient to satisfy the amounts hereinbefore found due to the plaintiff with interest and costs, it is further ordered and adjudged that the said sheriff proceed to sell the remaining lots in said Forbes’s subdivision of said southwest quarter of said section 34, which are situated in the north half of said southwest quarter of said section, or so many thereof as may be necessary to make the balance which may be still due to the said plaintiff herein, with interest and costs, and that in selling said lots he proceed in the inverse order of said conveyance so made by the said Forbes thereof, commencing with the lot No. 7, sold to the said J. W. Dorsey, being the last lot sold in the order of conveyances, and proceeding in said inverse order to sell so many and no more of said lots as may be necessary to satisfy the balance which may remain due to the said plaintiff, with interest and costs, and that if any surplus should remain therefrom, the said sheriff return the same into court for further order, and out of the proceeds of said sale the said sheriff is ordered to pay,” etc.

This decree was entered at the October term, 1877, of the district court of Douglas county. In September, 1880, the attorney of Parker filed the following in the district court:

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“District Court, Douglas County, October Term, A. D.
1887.

“JAMES M. PARKER
V.
GEORGE W. FORBES ET AL. } Decree.

“The said James W. Forbes, plaintiff, now comes and represents to the court that all the property described in the decree rendered in the above entitled cause, and therein ordered to be sold, has been sold by the sheriff as required by said decree, and that the total proceeds of said sale were insufficient to satisfy the amount found due to the said plaintiff under said decree and costs.

“Wherefore the said plaintiff prays that a supplementary decree may be entered herein, ordering and directing the sale by the sheriff of the remaining forty acres included in the mortgage given by the said Forbes to plaintiff, described in the original petition, and which was not ordered to be sold in the original decree entered herein, to-wit, the northwest quarter of the northeast quarter of section No. 34, township No. 16, range 13 east, to satisfy the balance remaining due on said decree and costs.”

The plaintiff's attorney filed an affidavit that he notified Forbes by letter; that he was then at Deadwood, Dakota, and that Forbes acknowledged the receipt of the letter. No other notice appears to have been given. The court thereupon made the following order:

“This cause coming on to be heard this day on the petition of the said plaintiff for an order directing the sale of the remaining forty acres of land included in the mortgage described in the original petition herein, and the court being satisfied that due notice has been given of this application, and it appearing that there was still remaining due on the first day of this term a balance of \$182.28 on the original decree rendered herein, after applying the proceeds of the sale of all the real estate described in the said original decree which was sold thereunder:

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"It is ordered that the forty acres of land in said original decree described and which remains unsold, to-wit, the northwest quarter of the northeast quarter of section 34, township 16, range 13 east, be sold by the sheriff at the time of said county of Douglas according to law, and that out of the proceeds of said sale he pay, first, the costs of said sale and of this proceeding; second, the balance remaining due as aforesaid upon said original decree as hereinbefore found, with interest, and that the surplus, if any, he return into court to abide its further order, and that upon the return of said sheriff of said sale and the confirmation thereof the said George W. Forbes and all persons claiming through or under him be forever excluded from all right, interest or equity of redemption in or to said premises above described or any part thereof," and the plaintiff below claims title under this supplemental decree.

Under this decree the land was sold to Ellen P. Forbes, the wife of James Forbes, for the sum of \$107, the sale was confirmed and a deed made by the sheriff to her, and afterwards she made a deed for said land to the defendant in error. The court below found the issues in favor of the defendant in error and rendered judgment accordingly.

The defendant below claims title under the sale on the Megeath judgment and a deed from Lucinda Randolph. On the trial of the cause the defendant below offered in evidence a deed from Lucinda Randolph to the plaintiffs in error for the land in question. This was objected to, as being irrelevant, incompetent, and no title having been shown in Lucinda Randolph. The objection was sustained and the deed excluded. In this we think the court erred, but in the view we take of the case it is not material, as the plaintiff below failed to show title in himself. The decree rendered in 1877 was final so far as the rights of persons affected thereby were concerned. Any party deeming himself aggrieved thereby could have appealed to

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the supreme court. The plaintiff in error and also Lucinda Randolph could rest upon the decree as rendered until they were notified in some of the modes provided by law for modifying or vacating the same, and any attempt to change it without such notice is a nullity. This question was before this court in *Blake v. McMurtry*, 25 Neb., 290, and it was held that a modification of a decree without notice to a party affected thereby was null and void and of no effect. It is not the policy of the law to conduct proceedings in court secretly or surreptitiously or without notice. To so hold would open the door to gross frauds. There was no authority, therefore, to render the supplemental decree in 1880, and the sale and all proceedings thereunder are void.

There are other errors in the record which need not be noticed. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 43 | 687 |
| 35 | 422 |
| 48 | 316 |
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| 53 | 259 |
| 35 | 422 |
| 60 | 720 |

ELIZABETH YEATMAN V. ELIZABETH J. YEATMAN.

[FILED OCTOBER 26, 1892.]

Allowance by County Judge of Claim Against Estate of Decedent: COLLATERAL ATTACK. An order of a county judge, duly made without fraud or collusion, allowing a claim against the estate of a deceased person is a final order, and unless appealed from will be conclusive and have the effect of a judgment and not be open to collateral attack.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

M. A. Hartigan, and J. C. Hartigan, for plaintiff in
vs. vs.

Tibbets, Morey & Ferris, contra.

MAXWELL, CH. J.

In 1879 one Griffin Yeatman made and delivered to the plaintiff a promissory note as follows:

“\$500. HASTINGS, ADAMS CO., NEB., June 1, 1879.

“One year after date I promise to pay to Elizabeth Yeatman, or order, the sum of five hundred dollars, with lawful interest, without defalcation, for value received.

“(Signed) GRIFFIN YEATMAN.”

Prior to September, 1886, Griffin Yeatman died and Elizabeth J. Yeatman was appointed administratrix of his estate. On the 10th of that month the note in question was allowed with other claims against said estate. The record entry is as follows:

“In the matter of allowance of claims against the estate of Griffin Yeatman, deceased.

“September 10, 1886. Comes now Elizabeth J. Yeatman, administratrix of the estate of Griffin Yeatman, deceased, and claims filed against estate examined, approved, and allowed by this court as follows respectively:

“The claimant, Elizabeth Yeatman, being present with the administratrix, and amount of her claim agreed on.

“Patrick McNeal, note, \$200, with interest at eight per cent from December 1, 1885.

“Elizabeth Yeatman, note, \$756, including interest to this date.”

This order is duly signed by the county judge of Adams county and was evidently made after due notice. From this order no appeal was taken, and, so far as appears, that order is now in full force.

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On November 25, 1889, the defendant in error presented her account to the county judge for final settlement, and the court, after allowing various items, made an order which, so far as it relates to this claim, is as follows:

“It is further found by the court that the claim of Elizabeth Yeatman was duly allowed against said estate of Griffin Yeatman, deceased, on September 10, 1886, in the sum of seven hundred and fifty-six dollars; that all other claims allowed against said estate have been paid, but that said administratrix has neglected and refused to pay said claim of Elizabeth Yeatman, and has expended a large amount of money in payment of claims not allowed, as aforesaid, and in investments without authority of law or any order from the court, leaving said claim and interest unpaid.” * * * “And it is further adjudged and ordered by this court that said Elizabeth J. Yeatman, administratrix of the estate of Griffin Yeatman, deceased, pay to said claimant, Elizabeth Yeatman, on her said claim of seven hundred and fifty-six dollars allowed against said estate, with accrued interest thereon at seven per cent per annum from September 10, 1886, the sum of eight hundred and eleven dollars and twenty-two cents, without further delay, and that said administratrix proceed to sell at private sale sufficient personal property belonging to said estate to pay the balance in full on said claim of Elizabeth Yeatman, and that said administratrix pay said claim in full and make due report thereof to this court.”

From this order the plaintiff appealed to the district court. A motion was thereupon made in that court to quash the appeal because not taken within the time fixed by law. The motion was sustained and the appeal dismissed and that is the error complained of.

It is claimed on behalf of the appellant that the order of the county judge, September 10, 1886, allowing the account was not a final order and, therefore, that no appeal would lie therefrom. It is also claimed that the last order

copied above is the final judgment in the case. We think differently, however. The allowance of a claim against an estate is a judicial act and has all the force and effect of a judgment, and will be conclusive unless reversed or vacated in some of the modes provided by law. (*Shoemaker v. Brown*, 10 Kan., 383.) In this case it is said: "All their allowances of demands against the estate, all their settlements with administrators, indeed all their official acts requiring the exercise of judgment and discretion, are, in their nature, judicial determinations, and are binding upon all the property of the estate, and upon any interest in such property that any person may have as heir, devisee, or legatee. The settlements with administrators especially come within the jurisdiction."

In *Jameson v. Barber*, 56 Wis., 630, the same ruling was made. To the same effect, *Estate of Schroeder*, 46 Cal., 319; *Beckett v. Selover*, 7 Id., 239; *Deck's Estate v. Gherke*, 6 Id., 666; *Tutt v. Boyer*, 51 Mo., 425; *Jones v. Brinker*, 20 Id., 87; *Kennerly v. Shepley*, 15 Id., 640; *Cossitt v. Biscoe*, 12 Ark., 97; *Swann v. House*, 50 Tex., 650; *Campbell v. Strong*, Hempst. [U. S.], 265. In two states it appears to be held that the allowance of an account is not final and conclusive. (*State v. Bowen*, 45 Miss., 347; *Levering v. Levering*, 64 Md., 399; Black on Judgments, sec. 641.) In *State v. Buffalo Co.*, 6 Neb., 454, it was held that the allowance of an account by a county board was a judicial act, and unless appealed from, the order allowing the claim would be final and conclusive; and the same doctrine had previously been announced in *Brown v. Otoe Co.*, 6 Neb., 111. The allowance of the note as a claim against the estate on the 10th of September, 1886, was a final order.

The fact that the note was apparently barred by the statute of limitations cannot be considered at this time. The presumption is that the administratrix acted in good faith. Payments may have been made on the note which

Elkhorn Land Co. v. Dixon County.

were not endorsed thereon, or for other cause, which does not appear, the note may have been a binding obligation against the estate. If it was not, it was the duty of those entrusted with the settlement of the estate to take the necessary steps by appeal to contest the allowance of the same. Having failed to do so the estate is bound by the order allowing the same, and it is now too late to raise the objection. The appeal was properly dismissed and the judgment is

AFFIRMED.

THE other judges concur.

**ELKHORN LAND & TOWN LOT CO. v. DIXON COUNTY
ET AL.**

[FILED OCTOBER 26, 1892.]

1. **Taxation: PUBLIC LANDS: RAILROAD GRANTS.** Upon the facts stated in the petition, *held*, that the railway company had earned the lands in controversy at the time the taxes were levied and that the state had, prior to said levy, parted with its title to the plaintiff's grantor and that the lands were taxable although the United States did not approve the selection of the state until after the levy of the taxes.
2. ———: **LANDS OMITTED FROM ASSESSMENT ROLLS: AUTHORITY OF COUNTY CLERK TO ENTER.** Under section 50 of chapter 46, Rev. Stats., the county clerk had authority, where lands in his county had not been assessed, to "enter the same upon the assessment roll and assess the value."

ERROR to the district court for Dixon county. Tried below before NORRIS, J.

Davis & Gantt, for plaintiff in error.

J. J. McCarthy, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendants to have an alleged cloud removed from certain lands possessed by it in Dixon county caused by the levy of taxes thereon by the county clerk of Dixon county in July, 1871. The petition is too long to copy here. The cancellation of the alleged cloud is sought on two grounds, which will be noticed in their order.

First—It is alleged, in substance, that the plaintiff derives title from the state; that the state derived title under the act of September 4, 1841, granting five hundred thousand acres of land to each new state for purposes of internal improvement; that on April 16, 1870, the state selected the lands in question, which selection was approved by the United States, October 13, 1871; that on February 15, 1869, the legislature of the state passed an act donating certain of said lands to such railroad companies as complied with said act by building ten or more miles of railroad; that after February 15, 1869, and before November, 1871, the F., E. & M. V. R. Co. built its third ten miles of railroad and thereupon the governor appointed commissioners, who approved of the same, whereupon, on the 30th day of November, 1870, the governor, in compliance with said law, issued letters patent for said lands to said railroad company, which afterwards conveyed to the plaintiff. It will be observed that the lands were not assessed until the next year after the railway company had obtained its patents. The company, therefore, had not only earned its lands but the state had recognized its right to the same and conveyed its title.

The case falls directly within that of *White v. B. & M. R. Co.*, 5 Neb., 393. In that case the section of road in dispute had not been accepted until sometime after the lands were assessed. The evidence that the company had earned the lands by the construction of the required

Elkhorn Land Co. v. Dixon County.

twenty miles of railroad was the certificate of approval, and until that was obtained its absolute right to the lands did not attach; therefore, the tax was held to be void. In the case at bar, however, the railway company was the owner of the land when the tax was levied, and neither it nor the plaintiff has any just cause of complaint if the court denies it relief.

Second—It is alleged that the assessment was made by the county clerk and that he had no authority to assess the same. Section 50, chapter 46, of the Revised Statutes, which was then in force, was as follows: "If on the assessment roll or tax list there be any error in the name of the person assessed or taxed, the name may be changed, and the tax collected from the person intended, if he be taxable and can be identified by the assessor or treasurer, and when the treasurer, after the tax list is committed to him, shall ascertain that any land or other property is omitted he shall report the fact to the county clerk, who, upon being satisfied thereof, shall enter the same upon his assessment roll, and assess the value, and the treasurer shall enter it upon the tax list, and collect the tax as in other cases." Here is full power given the county clerk to make the assessment. There is no complaint that the property was assessed too high, or any ground stated for equitable relief. There is no equity in the petition and the judgment of the court below is

AFFIRMED.

THE other judges concur.

JOHN F. CARVER, APPELLANT, V. FRANK TAYLOR,
APPELLEE.

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| 35 | 429 |
| 39 | 676 |
| 35 | 429 |
| 50 | 881 |

[FILED OCTOBER 26, 1892.]

1. **Real Estate: BREACH OF CONTRACT TO CONVEY: PETITION.**
Held, That the cause of action set forth in the petition relates solely to the breach of contract of the defendant to convey the real estate described in the petition.
2. ———: ———: **MEASURE OF DAMAGES.** In case of the breach of an executory contract to convey real estate where the vendor having title refuses or puts it beyond his power to convey, and no part of the consideration has been paid, the measure of damages which the vendee is entitled to recover is the value of the land at the time the contract should have been performed less the contract price.
3. ———: ———: ———: **NOMINAL DAMAGES.** Where the land is of less value than the contract price, the vendee is entitled to recover nominal damages for the breach of contract.

APPEAL from the district court for Adams county.
Heard below before GASLIN, J.

M. A. Hartigan, and *J. C. Hartigan*, for appellant.

Jno. M. Ragan, contra.

MAXWELL, CH. J.

The cause of action is set forth in the petition as follows:

“First—That on the 19th day of January, 1889, the plaintiff John F. Carver entered into a contract with the defendant Frank Taylor in words and figures as follows:

“‘Agreement made and entered into this 19th day of January, 1889, by and between John F. Carver, of Allen county, Indiana, as agent, and Frank Taylor, of Adams county, Nebraska, in which agreement the said Frank Taylor, of the second part, agrees to convey by warranty

Carver v. Taylor.

deed, clear of all incumbrances, the following described real estate, to-wit: Lots numbered 1, 2, 3, 4, 5, 6, and 7, in block number 2, in Birdsall's addition to the city of Hastings, Adams county, Nebraska; said lots front on Colorado avenue, and are each fifty feet front, running back one hundred and fifty feet to an alley on the west end of said lots. Said Frank Taylor also agrees to convey, by warranty deed, clear of all incumbrances, to said John F. Carver lot No. 8 in aforesaid addition; said lot also fronting on Colorado avenue to the east, and seventy-five feet front, and running back 150 feet to the aforesaid alley, said lot being in block No. 2 in Birdsall's addition to the city of Hastings.

“It is mutually agreed that the aforesaid lots shall be rated at \$8,000 in the exchange to be effected by this agreement and under its terms. In addition to the conveyance of the above described lots the said Frank Taylor agrees to pay to the said John F. Carver, or his order, \$4,000 on the terms and conditions of this agreement. In consideration of the conveyance of the aforesaid lots and the payment of the \$4,000 by the said Frank Taylor to the said John F. Carver, the said John F. Carver, of the first part, or agent, agrees to furnish to the said Frank Taylor, or the bank designated in this agreement, one case each, consisting of 10,000 cigars of the following brands of cigars, to-wit, one case of “Our Defense,” one case “Flowers,” one case of “Henry Clay,” one case of “Iron King,” one case of “American,” one case “La Rosa,” one case “The Stunner,” one case the “Mountaineer,” one case “Excelsior,” one case “Royal Chiefs,” and also eleven cases of “Peerless,” and seven cases of “Our Pearl.” The said Frank Taylor agrees to execute the aforesaid warranty deeds for the aforesaid lots, and deposit the same, together with abstracts, showing a complete and satisfactory title to be vested in said Frank Taylor to said lots, both deeds and abstracts to be deposited in trust

Carver v. Taylor.

in the First National Bank of Hastings, Neb., to be held in trust by said bank under the provisions of this agreement, until said John F. Carver, or the manufacturers, shall furnish to said bank the required amount of cigar stock agreed upon in this contract. Said John F. Carver, of the first part, agrees to furnish the brands at the following rates per thousand, to-wit: "Our Pearl," \$50 per M; "Peerless," at \$38 per M; "Our Defense," at \$35 per M; "Flowers," at \$35 per M; "Henry Clay," at \$40 per M; "Iron King," \$39 per M; "American," \$40 per M; "La Rosa," \$49 per M; "The Stunner," \$45 per M; "The Mountaineer," \$45 per M; "The Excelsior," at \$52 per M; "Royal Chief," \$55 per M.'

"The further conditions of this agreement are as follows, to-wit:

"The said Frank Taylor agrees to pay one-third in cash for any and all orders made under this agreement, the same to be paid out of the \$4,000 deposited in the said bank by said Taylor. The said Frank Taylor agrees, on each and every order made under this agreement for cigar stock, to furnish a statement from said bank, and made out by officers of said bank, to said John F. Carver, that the aforesaid bank will pay the aforesaid one-third amount of each and every bill so ordered by the said Frank Taylor in cash, on receipt of the bill of lading and the goods from any railroad or express company that may deliver the goods to said bank on the order of said Frank Taylor to said John F. Carver, the amount to be paid in cash on the different brands per M, on receipt of the same, is as follows, to wit: "Peerless," \$12.66 $\frac{2}{3}$ per M; "Our Pearl," \$16.66 $\frac{2}{3}$ per M; "Our Defense," \$11.66 $\frac{2}{3}$ per M; "Flowers," \$11.66 $\frac{2}{3}$ per M; "Henry Clay," \$13.33 $\frac{1}{3}$ per M; "Iron King," \$13 per M; "American," \$13.33 $\frac{1}{3}$ per M; "La Rosa," \$15 per M; "The Stunner," \$15 per M; "Mountaineer," \$15 per M; "The Excelsior," \$17.33 $\frac{1}{3}$ per M; "Royal Chiefs,"

\$18.33½ per M. The said amounts to be paid by the aforesaid bank in cash on receipt of the bill of lading and the goods.

“The said John F. Carver, as agent, agrees to deliver the said bill of goods as soon after the said Frank Taylor sends his order to the said John F. Carver, or the manufacturers, or the parties who furnish said stock to said John F. Carver deliver the same on John F. Carver's order for said stock in such amounts as said Frank Taylor shall order, when accompanied by the aforesaid statement from bank, that said bank will pay for said goods on receipt of same as specified in their agreement.

“It is mutually agreed that said Frank Taylor shall furnish as many duplicates of said statement on each order as said John F. Carver may require, not to exceed five duplicates of each order and statement from bank. It is mutually agreed that the aforesaid bank shall hold in trust the aforesaid deeds for the aforesaid lots until their contract is fulfilled.

“It is further agreed by said Frank Taylor that upon the completion of their contract, and filling the same by the delivery of the aforesaid amount of cigar stock, that the aforesaid bank shall turn over, and the said Frank Taylor hereby directs and empowers the said bank to turn over, the said deeds to John F. Carver, or his order, on the filling of this contract.

“It is agreed that a sample of the aforesaid brands of cigars shall be deposited with the deeds and abstracts to the aforesaid lots, together with a copy of this agreement, in the aforesaid bank, to be held in trust by said bank for both parties to this agreement, and that the cigars furnished under the provisions of this agreement shall be of the brands specified, and conform in quality to said samples deposited in said bank, and the said Frank Taylor agrees to order in not less than case lots for any brand ordered at any time, and to order said goods in a reasonable time after said goods are packed and ready for shipment.

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“Said Frank Taylor agrees to pay all freight or expressage on said bill of goods from the points of shipment to the city of Hastings, Neb., said goods to be shipped as ordered, by freight or express as said Frank Taylor shall order same.

“Witness our hands this 19th day of January, 1889.

“JOHN F. CARVER.

“FRANK TAYLOR.’

“Second—The plaintiff further shows unto the court that he has in all things pertaining to the said contract, its duties and obligations, fully performed the same; * * * that the defendant Frank Taylor has refused and still refuses to perform and fulfill the conditions of the said contract as he has undertaken so to do.

“Third— * * * That the lands and lots set out in the plaintiff’s petition, and specifically designated in the contract as being lots 1, 2, 3, 4, 5, 6, and 7 in block No. 2, were in truth and in fact subdivided by the defendant Frank Taylor, and set out in the contract to represent a larger number of lots than the said space of ground in truth and in fact represents.

“Fourth— * * * That the said lands as truly described upon the plat of the city of Hastings, or the portion of said plat in which it is included, is truthfully and correctly described as follows: Lots 1 and 2, block 2, Birdsell’s addition, or that the division and representation, as well as the description in the contract, was made for the false, fraudulent, and dishonest purposes of misleading, cheating, and defrauding this plaintiff.

“Fifth— * * * That he has no remedy outside of the court of equity by which he can obtain a full and fair redress of the wrongs and injuries, as well as the loss and damage caused to this plaintiff by this defendant’s conduct.

“The plaintiff therefore prays that the court order, adjudge, and decree that the said defendant specifically perform and execute the said contract as by him made and agreed;

Carver v. Taylor.

that said contract be corrected and reformed to cover and include the exact description of the said lands as the same are really described in the aforesaid plat, the said land being the land included in the said contract by erroneous, fraudulent, and deceptive description given by said defendant.

"The plaintiff further prays that should this honorable court find and declare that the said contract and agreement is not susceptible and subject to a specific performance, then, and in that event, the plaintiff prays that the said action may be retained by the court as an action at law, and that he should have and recover from said defendant his damages by reason of the premises in the same, and in the sum of \$10,000, with his costs and disbursements in and about the said action made and expended."

To this petition an answer was filed, in which it is alleged that the defendant has conveyed the lots in dispute and therefore cannot convey the same. On the trial of the cause the court rendered judgment in favor of the plaintiff for five cents damages, from which the plaintiff appeals.

We have carefully read all the evidence and exhibits and are fully convinced that the judgment is right. It will be observed that the petition is framed to enforce specific performance, or to recover damages for the failure to convey the land. In such case the measure of damages, where, as in this case, the vendor had title when the conveyance should have been made, and refuses to convey or disables himself from so doing by parting with the title, is the value of the property at the time the contract was to be performed, less the purchase price. (*Dustin v. Newcomer*, 8 O., 50; *Hopkins v. Lee*, 6 Wheat. [U. S.], 109; *Wells v. Abernethy*, 5 Conn., 222.)

In *Hopkins v. Lee*, *supra*, the court says: "The rule is settled in this court that, in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price at the

Carver v. Taylor.

time of its breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket; nor can it make any difference in principle whether the contract be for real or personal property if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference." The court in this case found that the defendant had acted in good faith and, in effect, that he was unable to convey to the plaintiff, but as the proof clearly shows that the land was of much less value than the price at which it was agreed the plaintiff should purchase the same, he suffered no actual damages by the refusal of the defendant to convey. The defendant, however, would be liable for nominal damages for a breach of the contract.

No facts are stated in the petition showing a loss of the plaintiff upon the cigars, and the proof upon that point is equally unsatisfactory. The plaintiff claims to have contracted for a part of the cigars, but what part he fails to state. He does not allege or claim that he had purchased and had, under the contract, any of the cigars. It is true he states in his testimony that he had contracted with three firms known to manufacture certain cigars for this contract, but he fails to state any fact from which the court would be justified in awarding him substantial damages. Upon the whole case it is apparent that the judgment is right and it is

AFFIRMED.

THE other judges concur.

WITHERS & KOLLS V. BRITTAIN, SMITH & CO. ET AL.

[FILED OCTOBER 26, 1892.]

Attachment: CONTRACT: UNLIQUIDATED DAMAGES RECOVERABLE ON ATTACHMENT BOND. An action upon an undertaking for an attachment is one arising upon contract and may be maintained by attachment against the property of a non-resident. The fact that the damages are unliquidated does not change the character of the action.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Thompson Brothers, for plaintiffs in error:

An action arising upon an attachment bond is an action on a contract. (*Raymond v. Green*, 12 Neb., 218.)

Thummel & Platt, contra:

Attachment will not lie for unliquidated damages resulting from the breach of contract, unless there is something in the contract itself which affords a rule by which they may be estimated. (*Clarks v. Wilson*, 3 Wash. [C. C. U. S.], 560; *Jeffery v. Wooley*, 5 Halstead [N. J. L.], 123; *Barber v. Robeson*, 3 Green [N. J. L.], 17; *Hazard v. Jordon*, 12 Ala., 180.)

MAXWELL, CH. J.

This action was brought by attachment on an undertaking as follows: "We bind ourselves to the defendants (meaning Withers & Kolls, plaintiffs) that the plaintiffs, Brittain, Smith & Co., shall pay to the said defendants the damages, not exceeding \$2,500, which they may sustain by reason of the attachment in this action if the order thereof be wrongfully obtained," to recover the sum of \$2,500 for the wrongful issuing of the attachment. Certain property of

Withers v. Brittain.

the defendants was levied upon, whereupon they made a motion to dissolve the attachment, "Because the facts stated in the affidavit are not sufficient to justify the issuing the same; that the attachment bond mentioned in the said affidavit was sworn out by plaintiffs on a suit pending in the district court of Hall county, Nebraska, for damages, and not on contract, judgment or decree executed by the defendants Brittain, Smith & Co. and H. J. Palmer; that said H. J. Palmer is a resident of Hall county, Nebraska; that the action so pending is one for damages, yet unliquidated, unsettled, and undetermined, and there is no authority in law for the issuing the said writ of attachment against a non-resident of the state or otherwise." The motion was sustained and the attachment discharged.

The defendants are non-residents of the state and the sole question presented is, Does the cause of action arise upon contract?

Section 198 of the Code provides: "An attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of the state, for any claim other than a debt or demand arising upon contract, judgment, or decree." An undertaking made in a legal proceeding is an agreement or contract in a certain contingency to perform certain acts, as if judgment is rendered in favor of the adverse party, to pay the judgment. So if an attachment is issued, an undertaking is given to pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained. Here is an agreement to pay the damages if the attachment is dissolved; in effect, that if no sufficient cause existed for issuing the same, the party undertaking will compensate the one whose property is attached for the damages he may thereby sustain. Now, will any one contend that an action on the undertaking is not upon this agreement. The fact that the damages are unliquidated can make no difference. The contract limits the liability of the obligors to

Gray v. School District.

the amount stated in the undertaking, so that in no event can it exceed that sum, but to the extent of the injury a recovery may be had up to that limit.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 51 | 230 |
| 51 | 240 |

FRED W. GRAY V. SCHOOL DISTRICT OF NORFOLK.

[FILED OCTOBER 26, 1892.]

1. **Statutory Bonds: REQUIREMENTS: WAIVER: LIABILITY OF SURETIES.** While a statutory bond must conform substantially to the requirement of the statute in respect to penalty, conditions, form, and number of sureties, yet, where two or more sureties are required and it is signed by but one, who by his words or acts waives additional sureties, he will be held liable.
2. **Contractor's Bond: LIABILITY OF SURETIES.** A surety on the bond of a contractor for the erection of a building is bound only in the manner and to the extent provided in the obligation, and if payments are made to the contractor in excess of the amounts due on the estimates, he will not be liable for such excess.
3. **Mandamus to School District.** *Held*, Upon the facts stated in the petition, that *mandamus* would lie.

ERROR to the district court for Madison county. Tried below before POWERS, J.

Wharton & Baird, for plaintiff in error.

Barnes & Tyler and *John R. Hays*, contra.

MAXWELL, CH. J.

A general demurrer was sustained to the petition in the court below and the action dismissed. The petition is as follows:

"The relator, Fred W. Gray, of the city of Omaha, in Douglas county, Nebraska, respectfully states and informs the court that the school district of Norfolk, in the said county of Madison, on or about the 26th day of November, 1889, entered into a written agreement with one Martin T. Murphy, of Omaha, Nebraska, whereby the said Murphy agreed with the said school district of Norfolk, to well and sufficiently erect, furnish and deliver in a perfect, and thoroughly workmanlike manner, on or before the 1st day of August, 1890, a school house situated on lots 6 and 7, in block 5, of Koeninstein's first addition to the city of Norfolk, in said Madison county, Nebraska, according to the plans and specifications made and furnished by J. C. Stitt, architect, to the satisfaction and under the direction of said architect. In consideration of which the said school district agreed to pay the said Murphy the sum of \$22,500. Providing in said contract, among other things, that on the first of each month during the progress of the work thereby agreed to be performed, the architect should make an estimate of the materials furnished on the ground and of the work done since the last previous estimate, and upon said estimate being furnished to the said school district in writing, it should thereupon pay the said Murphy eighty-five per cent of said estimate, and the remaining amount should be payable upon the completion of said school building. And providing further, amongst other things in said contract, that said school district should have the right, at their election, instead of paying on the architect's estimates to said Murphy the amount from time to time found due and payable, to pay the amount for material or labor on said building to the party or parties furnishing

the same, and that the receipts of such party or parties furnishing such material or labor should be accepted by said Murphy as so much cash in hand paid. And providing further in said contract, amongst other things, that should said Murphy, at any time during the progress of said building, refuse or neglect to supply a sufficiency of material or workmen, or cause any unreasonable neglect or suspension of work, or fail to comply with any of the said articles of agreement, the school board of said district, or any committee thereof, should have the power and right to enter upon and take possession of the premises and provide material and workmen sufficient to finish said buildings, after giving forty-eight hours' notice in writing and personally delivering to said Murphy, and that the expense of such notice and the finishing of the said building would be deducted from the amount of said contract. And providing further, amongst other things, that no assignment of said contract or any interest therein by said Murphy should be of any validity, or binding upon said school district unless the assent thereto of said school district should be obtained in writing. Which contract was duly signed by said school district and the said Martin T. Murphy, all of which will fully appear by reference to the same, a copy of which is herewith filed, marked 'Exhibit A' and made part hereof.

"Second—The relator further represents and informs the court that for the purpose of securing to said school district compliance with the terms of said contract, the said Martin T. Murphy, as principal, and Fred W. Gray, the relator, as surety, executed and delivered to the school board of said school district their bond in the penal sum of \$10,000, bearing date November 26, 1889. Providing in said bond that the conditions of the same were such, that whereas the said Murphy had been awarded the contract for the erection and completion of a school building in Norfolk, Madison county, Nebraska, for the agreed price

of \$22,500, that if the said Murphy should well and truly erect and complete said building according to the drawings, plans, and specifications prepared by the architect, J. C. Stitt, and that if the said Murphy should in all respects comply with his contract for the erection and completion of said building within the time mentioned in said contract, and should pay all laborers and mechanics for labor that should be performed, and all material-men for material that should be used in the erection of said building, and perform all said contract, then, in that case, said obligation should be void and of no effect, but otherwise should be and remain in full force and virtue. All of which will fully appear by reference to said bond, a copy of which is herewith filed, marked 'Exhibit B' and made part hereof.

"Third—The relator further represents and informs the court, that on or about the 1st day of December, 1890, the school board of said district notified the relator that said Martin T. Murphy had not complied with the terms of said contract in the erection of said school building, and demanded of the relator compliance with the terms of said contract, under and by virtue of the provisions of the said bond on which the relator was surety, and that accordingly the relator proceeded to confer with the said school board of said school district and the said Martin T. Murphy, and in consideration of the premises and of one dollar and for other good and valuable consideration and of the liability of the relator upon said bond, the relator secured from said Martin T. Murphy, by and with the knowledge and consent of the said school board, an assignment to him, the relator, of all right, title, and interest of the said Murphy, in or to said contract, and authority from said Murphy to collect from said school district the amounts due and to become due on said contract; which assignment and authority was given by said Murphy, in writing, on the 11th day of December, 1890, as will fully appear by reference to the same, a copy of which is herewith filed, marked 'Exhibit C,' and made part hereof.

“Fourth—The relator further represents and informs the court that upon receiving said notice and demand from said board and assignment from said Murphy as aforesaid, the relator, in compliance therewith, and with the knowledge and consent and request of said school district, proceeded to furnish the materials, labor, and skill for the completion of said building in accordance with the terms of said contract, and that thereupon, between the 17th day of December, 1890, and the 21st day of April, 1891, the relator paid expenses, furnished materials, skill, and labor upon said school building in accordance with said notice and demand from said school board, and in accordance with the terms of said contract, and with the knowledge and consent of said school board amounting in all to the sum of \$7,742.63, and the said school board paid thereon to the relator on December 15, 1890, the sum of \$1,000; on January 2, 1891, the sum of \$48.22; on January 9, 1891, the sum of \$1,173.43; on February 17, 1891, the sum of \$1,109.17; on April 24, 1891, the sum of \$10.50; and on April 24, 1891, the sum of \$85.50, making total payments of \$3,426.82; leaving balance due the relator of \$4,315.81, no part of which has been paid. All of which will fully appear by reference to an itemized account of said expenses and payments, a copy of which is herewith filed, marked ‘Exhibit D,’ and made part hereof.

“Fifth—The relator further represents and informs the court that the relator on the 21st day of April, 1891, completed said building in accordance with the terms of said contract between said school district and Martin T. Murphy, and the said school board of said district received said building from the relator, and were fully satisfied with the completion thereof as performed by the relator; and that there is now due the relator for the expenses, materials, skill and labor performed in the completion of said building as aforesaid the said balance of \$4,315.81, and that said school district has sufficient funds in the

treasury thereof belonging to the said building fund to pay said sum to the relator, and that the board of said school district have neglected and refused, and still neglect and refuse to execute and deliver to the relator the necessary warrant on the treasurer of said school district for said sum.

“Sixth—That relator further represents and informs the court that at the time the relator commenced furnishing materials, skill, labor, and expenses of completing said school building it was understood and agreed, by and between the relator and the school board of said school district, that eighty-five per cent of the architect's estimates, which should be made thereafter in accordance with the terms of said contract, and also the balance then due and which might become due upon said contract upon the completion of said building, should be paid by said school district to the relator, and that in pursuance of said understanding and agreement with the said board, and with the full knowledge and consent of said school board, the relator proceeded to furnish the said skill, labor, materials, and expenses for the completion of said building, and did complete the same to the full satisfaction of said school district; that in pursuance of said understanding and agreement the said school board of said district paid to the relator on December 15, 1890, the said sum of \$1,000; and on January 2, 1891, the said sum of \$48.22; and on January 8, 1891, the said sum of \$1,173.43, being eighty-five per cent of the architect's January estimate; and on February 17, 1891, the sum of \$1,109.17, being eighty-five per cent of the architect's February estimate; and on April 24, 1891, the said sums of \$85.50 and \$10.50, being for extras furnished by the relator in the completion of said building; that on or about the — day of March, 1891, the said school board of said school district at a meeting thereof, adopted and caused to be spread upon the records of said board a preamble and resolution, of which the following is a copy, to-wit:

Gray v. School District.

"The following preamble and resolution was offered:

" ' WHEREAS, In the contract with M. T. Murphy for the erection of the school building, now nearly completed, it is provided that the school board shall have the right, at their election, instead of paying on architect's estimates to the contractor, the amount for material or labor on such building to the party or parties furnishing material or performing labor, and the receipts of any and all such parties to the amount actually due them shall be accepted by the said Murphy as though so much cash in hand paid; and

" ' WHEREAS, The bond given by M. T. Murphy, as principal, and Fred W. Gray, as surety, for the faithful performance of said contract, provides that if the said Murphy shall pay all laborers and mechanics for labor that shall be performed, and all material-men for material that shall be used in the erection of said building and in performing his said contract, then, in that case, said obligation to be void, but otherwise to be and remain in full force; and

" ' WHEREAS, There is a large number of claims filed with this board for material furnished and for labor performed in the erection of said school building which are not paid, but which this board is desirous should be paid, to-wit:

| | |
|--|------------|
| Norfolk Brick & Tile Company..... | \$1,891 80 |
| Chicago Lumber Company..... | 49 08 |
| T. W. Wheaton..... | 390 80 |
| L. C. Mittelstadt..... | 149 39 |
| C. F. Eiseley..... | 144 39 |
| Acme Pressed Brick Company..... | 562 25 |
| Jno. Nurer..... | 6 00 |
| Welshaus & Gibson..... | 248 26 |
| C. W. Babcock & Co..... | 716 00 |
| Edwards & McCollough Lumber Company... | 4 40 |
| August Pasewalk..... | 6 00 |
| Otto Buckel..... | 4 65 |
| T. H. Batte..... | 15 00 |
| Jno. Ingoldsby..... | 40 00 |
| Adamant Wall Plaster Company..... | 279 70 |

“‘AND WHEREAS, The said Murphy and said Gray have each neglected, failed, and refused to pay any of said claims: Therefore,

“‘*Resolved*, That in order that justice may be done to all parties, it is hereby ordered that this board does hereby elect, as is provided it may do, to pay said claims and to tender to said Murphy and to said Gray receipts from said parties instead of cash to the amount actually due said parties.

“‘*Resolved*, That the secretary of this board is hereby directed to issue the warrants of the district on the proper fund to the said parties for not more than the amounts mentioned and for not more than is actually due them, and to tender the receipts taken for payment to the contractor, M. T. Murphy, and to Fred W. Gray, instead of cash on estimates as heretofore, except that the claims of the Adamant Wall Plaster Company, \$279.70, shall not be included nor paid for want of funds.’

“And the relator further represents and informs the court that said resolution was adopted by said school board without the knowledge or consent of the relators, and that the relator, on being informed that said resolution had been adopted by said board on the 27th day of March, 1891, thereupon proceeded to notify said board that he would refuse to receive in settlement of said contract any receipts for payments made by said board to mechanics or materialmen for labor performed or materials furnished for said building except such payments be for materials furnished or labor performed after the date of the assignment of said contract by said Murphy to the relator, and that upon April 1, 1891, or as soon thereafter as the relator could be heard, he would apply to Hon. Isaac Powers, Jr., judge of the district court of the seventh judicial district of Nebraska, for a writ of *mandamus* requiring said board to pay to the relator all sums of money due upon the estimates for the month of February which had been made,

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and estimate for the month of March to be hereafter made, and all other sums that might become due from said board under contract. Which notice was reduced to writing and served upon said school board on the 27th day of March, 1891, and is in the words and figures following, to-wit:

“To the Board of Education of the School District of Norfolk: You are hereby notified that I demand all moneys due and to accrue upon the contract heretofore entered into between M. T. Murphy and your honorable board for the construction of a high school building in the said district, and I shall refuse to receive in settlement of such contract any receipts for payments made by you to mechanics or material-men for labor performed or material furnished for said building, except such payments be for labor performed or material furnished since the assignment of said contract by said Murphy to me, and you are further notified that upon April 1, or as soon thereafter as I can be heard, I shall apply to Hon. Isaac Powers, Jr., a judge of the district court of the seventh judicial district of Nebraska, for a writ of *mandamus* requiring you to pay to me all sums of money due upon estimate for the month of February already made, and estimate for the month of March, to be made on the first day of April, and shall hold you personally responsible for any misappropriation of the funds due and to become due upon said contract by payment to any other persons, or otherwise.’”

A copy of the contract and bond are set out as exhibits and need not be noticed.

The first objection of the plaintiff in error is that the bond in question is void on its face because it is signed by but one surety (*Cutler v. Roberts*, 7. Neb., 4), while the statute requires at least two. In the case cited it was held that a statutory bond must conform substantially to the requirements of the statute in respect to its penalty, condition, form and number of sureties, and a surety may insist, as a defense in an action on a bond signed by but one surety

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where the statute requires two or more, that he is not liable thereon unless he waive the condition. That, we think, is a correct statement of the law, but, it is doubtful if it applies to the case at bar.

The contractor and surety were both residents of Omaha, and we are led to infer that the relator did not expect another surety to sign the bond with him but voluntarily become sole surety for Murphy. If such was the case, it would be a waiver of additional sureties on the bond. The fact that he recognized his liability to the defendant for the completion of the building is a strong, if not a controlling, circumstance to show a waiver on the relator's part. The contract provides for monthly estimates. "On the first day of each month, during the progress of the work hereby agreed to be performed, the architect shall make an estimate of the materials furnished, and on the ground, and of the work done since the last previous estimate, and not included in any previous estimate, and when said estimate is furnished said first party in writing, said first party shall thereupon pay said second party eighty-five per cent of said estimate, and the amount remaining on completion of said contract shall become due and payable when said school building shall be fully finished and accepted by said architect and by the school board, or a committee designated by the said board for the purpose, and when the said first party shall be fully satisfied that no liens or claims of any kind exist against said property or any part thereof for which said first party would or could be liable. *Provided*, Said first party shall have the right, at their election, instead of paying on the architect's estimate to the second party the amount from time to time found due and payable, to pay the amount for material or labor on said building to the party or parties furnishing material or performing labor, and the receipt of any and all such parties to the amount actually due them shall be accepted by the second party as though so much cash in hand paid." This provision, if the allegations of

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the petition are true, has been disregarded. The defendant no doubt had a right under the contract to pay the workmen and material-men instead of paying the contractor, but to hold the surety liable the payments must be made upon each estimate so far as it is sought to charge the eighty-five per cent. No doubt claims of that kind may be deducted from the fifteen per cent held back till the completion of the contract. The surety had a right to rely upon the conditions of the contract (*Brennan v. Clark*, 29 Neb., 386), and it was held in the case cited that "The sureties on the bond of a contractor for the erection of a building are bound only in the manner and to the extent provided in the obligation. And when the contract provided that the work was to be done under the supervision of an architect named, and payments to be made only on estimates made by him from time to time as the work progressed, and certain payments were made without such supervision and estimates, that the sureties were entitled to a deduction for any injury they may have sustained thereby." (*Simonson v. Thori*, 31 N. W. Rep. [Minn.], 861; *Miller v. Stewart*, 9 Wheat. [U. S.], 680; *Mayhew v. Boyd*, 5 Md., 102; *Brigham v. Wentworth*, 11 Cush., 123; *Paine v. Jones*, 76 N. Y. 274; *Atlanta Nat. Bank v. Douglass*, 51 Ga., 205; *Ryan v. Shawneetown*, 14 Ill., 20; *Judah v. Zimmerman*, 22 Ind., 388; *Calvert v. London Dock Co.*, 2 Keen [Eng.], 639; *Bragg v. Shain*, 49 Cal., 131; *Dundas v. Sterling*, 4 Pa. St., 73; *Weir Plow Co. v. Walmsley*, 110 Ind., 242; *Taylor v. Johnson*, 17 Ga., 521.) If the allegations of the petition are true, therefore, the defendant paid estimates in excess of those provided for in the contract, and to that extent the surety may not be liable. Sufficient is alleged to require the defendant to answer.

Third—The amount due appears to be admitted, but it is sought to apply the same in payment of claims instead of paying it to the relator. This being so, the relator may sustain an action by *mandamus*. The judgment of the

Belcher v. Palmer.

district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 35 | 449 |
| 57 | 613 |

WILLIAM BELCHER ET AL. V. GEORGE F. PALMER.

[FILED OCTOBER 26, 1892.]

1. **Pleading: SUFFICIENCY OF PETITION WHEN ATTACKED AFTER JUDGMENT.** Petition and exhibit set out in opinion held sufficient after judgment to sustain it, as the defendant who could avail himself of the defense does not object.
2. **Jurisdiction: SUMMONS: DEFENDANTS RESIDING IN DIFFERENT COUNTIES.** Where there is no charge of collusion or fraud between the indorser and holder of a promissory note as to the liability of such indorser, and an action is brought against him in the county where he resides within the state, and service had on him there, a summons may be issued and served on the makers in other counties of the state.

ERROR to the district court for Hall county. Tried below before HARRISON J.

O. A. Abbott, and A. M. Robbins, for plaintiffs in error.

Thummel & Platt, contra.

MAXWELL, CH. J.

This action was brought in the county court of Hall county by the defendant in error against the plaintiffs in error and H. J. Palmer. The petition is as follows:

"The said plaintiff demands judgment against said defendant for the sum of \$530, with interest thereon from the 27th day of October, A. D. 1883, at ten per cent per

Belcher v. Palmer.

annum, and costs of suit, upon a promissory note made and delivered by defendant, in the name of A. Rowan and Wm. Belcher, to H. J. Palmer, and assigned to plaintiff, who is now the owner thereof. A copy of said note is hereto attached, marked 'Exhibit A,' and made a part hereof. Said note is now long past due and no part of same has been paid. And there is now due from the defendant to the plaintiff upon said note the amount first above demanded, with interest, as stated above."

The promissory note with the indorsements thereon is as follows:

"\$530. LAW OFFICE OF THUMMEL & PLATT,

"GRAND ISLAND, NEB., Oct. 27, 1883.

"October 27, 1884, after date, for value received, we, or either of us, promise to pay to the order of H. J. Palmer, five hundred and thirty dollars, at Thummel & Platt's office, with interest at ten per cent per annum from date until paid. Secured by C. mortgage dated on 10-27-'83, on two mules, two horses, one wagon, sixteen head of cattle.

A. ROWAN.

"WM. BELCHER."

Indorsement on back:

"March 4, 1885, credit by sale of horses taken back, \$30; less expenses as follows:

| | |
|------------------------------------|---------|
| One month keep at \$1 per day..... | \$30 00 |
| Advertising of foreclosure..... | 6 25 |
| Sale | 1 00 |
| | \$37 25 |

"H. J. PALMER."

William Belcher answered the petition, in substance, that he was a resident of Loup county, Nebraska, and that Rowan was also a resident of Loup county, but the defendant H. J. Palmer is, as defendant believes, a resident of Hall county. That Palmer was not jointly indebted

Belcher v. Palmer.

with said defendants on said note, and therefore there has been no legal and proper service on the answering defendants.

Rowan demurred to the petition: first, because the court had no jurisdiction, and second, because the petition fails to state a cause of action. Default was taken against Palmer. The cause was then continued, by consent of parties present, to the 5th day of November, 1889, at 9 o'clock A. M. Various continuances were had by agreement until March 27, 1890, when the demurrer was overruled, whereupon Rowan answered, in substance, that he is a resident of Valley county, that the note was transferred to the plaintiff below long after it became due; that no demand for payment was ever made upon him or Belcher, nor any notice of non-payment given to H. J. Palmer, and third, that he paid on said note to H. J. Palmer \$350 in one span of horses. A reply was filed which need not be noticed. The cause was further continued to June 16, 1890, when a trial was had. The docket entry is as follows:

"June 16, 1890, 10 A. M. Plaintiff present by attorney. Defendants A. Rowan and Wm. Belcher present in person and by attorneys, O. A. Abbott and A. M. Robbins. Case called. W. H. Platt, G. F. Palmer, and H. J. Palmer sworn and examined on behalf of plaintiff. Plaintiff rests. Defendant moved to dismiss action for the reason that plaintiff has proven no demand on the makers of the note sued on, and has failed to prove any notice to the indorser thereon of a failure to pay by said makers. Motion argued, submitted, and overruled, to which defendants excepted. Defendants Wm. Belcher and A. Rowan sworn and examined on their own behalf. Depositions of sundry witnesses read on behalf of defendants. Defendants rest. Plaintiff calls J. A. Clement, Fritz Langman, F. E. Stroud, O. U. Wescott and John Fonner, who were sworn and examined on behalf of plaintiff in

Belcher v. Palmer.

rebuttal. Case argued and submitted and taken under advisement by the court till June 17, 1890, 9 A. M.

"June 17, 1890, 9 A. M. I find for the plaintiff that there is due from said defendants, A. Rowan and Wm. Belcher, as makers, and H. J. Palmer, as endorser, to said plaintiff upon said note, the sum of \$648.77, principal and interest. It is therefore considered by me that said plaintiff recover from said defendants, A. Rowan and Wm. Belcher, as makers, and H. J. Palmer, as endorser, the said sum of \$648.77, the amount so as aforesaid found due, and the cost of suit herein, taxed at \$41.20, judgment to draw interest at ten per cent, as provided in said note, execution to issue."

The case was taken on error to the district court, where the judgment of the county court was affirmed. None of the evidence is preserved. H. J. Palmer is not here objecting either to the petition or judgment. There is no allegation of collusion or fraud in the answer or any fact to show that the judgment is unjust, but because of the failure to allege a waiver of demand and notice, or facts to show such demand and notice, we are asked to hold that the judgment cannot be sustained, and this, too, by parties who are not affected by the failure to plead these facts. This we cannot do. In the absence of collusion or fraud, neither of which is charged, Belcher and Rowan cannot object to the rendering of judgment against Palmer. It is unnecessary to discuss the matter. On the pleadings alone there is no prejudicial error shown. The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

Township of Inavale v. Bailey.

**TOWNSHIP OF INAVALE V. JUDSON BAILEY, COUNTY
CLERK, ET AL.**

[FILED OCTOBER 26, 1892.]

**County Supervisors: PROCEEDINGS OF BOARD: MAJORITY
VOTE: HOW DETERMINED: CHANGING TOWNSHIP BOUNDARIES.** Section 912 of the Consolidated Statutes provides that "two-thirds of the whole number of supervisors elected shall constitute a quorum, and a majority thereof, if present, may transact business." In changing the boundaries of a township, there were present seventeen members of the board, of which eight voted in favor of the change and seven against, and two refrained from voting. *Held*, That it was the duty of all present to vote, and those not voting must be counted in making up the aggregate, and that as less than a majority had voted in favor of the proposition, it had failed.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

John R. Wilcox, for plaintiff in error.

Case & McNeny, contra.

MAXWELL, CH. J.

A demurrer to the petition was sustained in the court below and the action dismissed. The petition is as follows:

"Your petitioner says that it is one of the townships of Webster county, Nebraska; that defendant Walnut Creek township is also one of the townships of said county; that defendant Judson Bailey, is county clerk of said county, and defendant Manley McNitt is treasurer of said county.

"Your petitioner says that prior to and up to June 21, 1888, the south boundary of Inavale township was the Republican river, and the boundary of defendant Walnut Creek township was the same portion of the Republican river; that some time prior to said June 21, 1888, the de-

Township of Inavale v. Bailey.

defendant Walnut Creek township, without notice to plaintiff, presented to the defendant board of supervisors a petition signed solely by residents and property owners of said Walnut Creek township, praying the said board to change the boundary of the said Inavale and Walnut Creek townships so as to make the township line between towns 1 and 2, range 12, the boundary between said townships instead of the river; plaintiff says that the effect of this change, when made, was to transfer from Inavale township to Walnut Creek township the following lands and the personal property of those living thereon, to-wit: lots 1, 2, 3, 4, and 5 of section 1, town 2, range 12; lots 1, 2, 3, 4, 5, and 6, section 2, town 1, range 12; northeast quarter the north half, and southeast quarter of the northwest quarter, and lots 3, 4, 5, and 6, section 3, town 1, range 12; northwest quarter, the north half, the northeast quarter, and lots 3, 4, 5, and 6, section 4, town 1, range 12; all the north half, and lots 3, 4, 5, and 6, section 5, town 1, range 12; all section 6, and north half northeast quarter, the northeast quarter of the northwest quarter, and lots 4, 5, and 6, section 7, town 1, range 12.

“Plaintiff says that all the owners of said land and property remonstrated and objected against said change, but that the said defendant board of supervisors illegally and unlawfully made such change, and defendant Bailey threatens to put, is putting, or has put said property upon the tax list of Webster county, Nebraska, for the year 1888, as though said property was in Walnut Creek township, and to put it upon the township tax list of said township. Defendant McNitt threatens to collect the township taxes for the year 1888 upon said property and pay them over to the said Walnut Creek township.

“Plaintiff prays that defendant Bailey may be ordered to put said property upon the tax list of Inavale township in both township and county tax books; that the said pretended change in the boundary lines of said plaintiff and

defendant townships may be declared illegal and void, and that defendant McNitt may be ordered to pay over the township taxes which he may collect upon said property to plaintiff."

This petition was duly verified. The petition was amended by adding the following:

"Comes now plaintiff and amends his petition by adding the following allegations thereto: That said order for said change of boundaries is void, for that there were present at the meeting of the defendant board of county supervisors, June 21, 1888, at which said order was made, seventeen members of the board; that the question of the change of boundaries came up before said board on the two reports of the committees, and the majority report against the change of boundaries was rejected. The minority report in favor of said change was decided and accepted by a yea and nay vote, and resulted in eight yeas and seven nays, two members present not voting, and that no further or other action was taken except to declare the report of the committee accepted, and it is upon that state of facts that defendant clerk and treasurer, threaten to act.

"Affiant says that said board has a set of rules governing their proceedings, rule 8 of which is: 'In order to carry any question it shall be necessary for a majority of the members present to vote in the affirmative.'"

Section 912 of the Consolidated Statutes provides: "Two-thirds of all the supervisors elected in any county shall constitute a quorum for the transaction of business, and all questions which shall arise at meetings shall be determined by the votes of a majority of the supervisors present, except in cases otherwise provided for." It is the duty of all members present to vote upon every proposition properly before the board for its determination. The members are to transact the county business. It may be presumed that each member intends to perform his duty faithfully and efficiently. This requires him to use his

 Farrington v. Stone.

best judgment and act upon every proposition submitted. If one member may shirk his duty in that regard why may not all? The intention of the law is that all present shall vote. The law is not that only a majority of those voting shall be necessary, but of those present. Each member takes an oath to faithfully discharge his duty. This means every duty—not such as he may desire to discharge, but every duty connected with his office. It is his duty, therefore, to vote upon every proposition properly before the board, and if two voters are present but do not vote, they are nevertheless to be counted in making up the aggregate of the votes. The petition therefore states a cause of action, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 35 | 456 |
| 52 | 663 |

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|-----|-----|
| 35 | 456 |
| 61 | 240 |
| 161 | 469 |

SAMUEL P. FARRINGTON ET AL., APPELLEES, V. JOSEPH D. STONE ET AL., APPELLANTS.

[FILED OCTOBER 26, 1892.]

1. **Creditor's Bill: BONA FIDE PURCHASER.** In the decree of the district court the defendant Sarah A. Stone was found to be a *bona fide* purchaser, and entitled to a prior lien to the extent of \$600. *Held*, That the proof tended to show that she was a *bona fide* purchaser, and entitled to hold the entire property as such.
2. ——— : **FRAUDULENT CONVEYANCE.** It is not sufficient that the vendor desires to defeat the payment of a claim by the transfer of his property; to render the conveyance fraudulent it must be taken with knowledge, actual or constructive, of the proposed fraud, or there must be a want of consideration.
3. ——— : ———. While a transfer of property to a relative by a

Farrington v. Stone.

person liable on a claim, where the effect will be to defeat the payment of the same, will be scrutinized very closely, yet it will be sustained, if made in good faith for an adequate consideration.

APPEAL from the district court for Fillmore county.
Heard below before MORRIS J.

John D. Pope, and Charles H. Sloan, for appellants.

Ong & Jensen, and Robert Ryan, contra.

MAXWELL, CH. J.

This is a creditor's bill, brought by the plaintiffs against the defendants in the district court of Fillmore county, to have certain real estate, described in the petition, declared the property of Joseph D. Stone, and applied to the payment of the plaintiffs' judgment. The facts, as they appear, are substantially as follows:

In July, 1882, one Woodruff was engaged in the mercantile business in Friend, Nebraska, and being indebted in a considerable amount to various persons, among others the plaintiffs, sold and transferred his entire stock of goods, book accounts, etc., to Joseph D. Stone, who was then engaged in banking at Friend. The plaintiff brought suit against Woodruff by attachment, and levied upon a portion of the goods transferred to Stone, who, in the meantime, had transferred the same to one Starkey. Starkey brought an action against the officer for the conversion of the goods, and recovered judgment, which was reversed in this court. (*Lane v. Starkey*, 15 Neb., 285.) On the second trial, judgment was rendered in favor of Starkey, which was affirmed in this court. (*Lane v. Starkey*, 20 Neb., 586.) The plaintiffs thereupon brought an action against Stone for the amount of the judgment paid by them, and a judgment was rendered in their favor on the 18th of June, 1888, for the sum of \$1,348.63 and costs.

No appeal was taken from that judgment and it is now in full force. An execution was issued on this judgment, which, on the 6th day of January, 1890, was returned *nulla bona*. Afterwards, an execution was issued on a transcript of the judgment in Fillmore county, and a levy made on the land in question.

On the 14th of December, 1888, Joseph D. Stone and wife sold and conveyed the land in controversy to Sarah A. Stone, for the expressed consideration of \$4,000. The question to be determined is the good faith of this transaction. The court below held, in effect, that Sarah A. Stone was a good faith purchaser to the extent of \$600 and gave her a lien prior to the plaintiffs on the land for that amount and interest, and ordered the land sold and the proceeds applied to the plaintiffs' judgment. In the deed of conveyance from Joseph D. Stone and wife we find the following: "That we, Joseph D. Stone and Charity F. Stone, husband and wife, of the county of Saline and state of Nebraska, for and in consideration of the sum of four thousand dollars in hand paid, do hereby grant, bargain, sell, convey, and confirm unto Sarah A. Stone, of the county of Fillmore and state of Nebraska, the following described real estate, situated in ——— county and state of Nebraska, to-wit: The northeast quarter of section 14, in township 8 north, of range 2 west, in the district of lands subject to sale at Lincoln, Nebraska, containing one hundred and sixty acres. This deed is subject to a mortgage of sixteen hundred dollars, which is assumed by the party of the second part and agrees to pay as a part of the purchase money."

The testimony tends to show that Sarah A. Stone had considerable property and had done business in her own name for many years; and some time prior to this transfer had had an interest in a mill with J. D. Stone, but this had been terminated before the deed in question was made. It also appears that several years ago J. D. Stone had started a small bank at Friend on borrowed capital; that

Farrington v. Stone.

the husband of Sarah had assisted him to the extent of his ability; that Sarah had owned a number of steers which were sold and the proceeds paid to J. D. Stone as a loan; that in November, 1888, J. D. Stone sold the land in question to Sarah for \$4,000. Of this amount she was to be credited the amount of \$400 with interest for the loans derived from the sale of the steers; that she assumed the \$1,600 mortgage and gave her individual notes for \$2,000, one for the sum of \$1,000 with interest at ten per cent, due in 1891, and the other for a like amount with interest due in 1893; that upon one of these notes the sum of \$600 has been paid. So far as appears the land was sold for a fair price and the evidence fails to show a want of good faith on the part of Sarah.

The testimony tends to show that J. D. Stone did not consider the plaintiffs' claim a just debt, and that he had used expressions that indicated an intention on his part to pay his other debts but to avoid payment of this claim if he could. If all that is alleged on behalf of the plaintiffs in that regard is true, while it would show an intention on his part to avoid payment, still it could not affect a *bona fide* purchaser. The fact that Sarah was the wife of the son of J. D. Stone, while a circumstance that requires the court to scrutinize the transaction very closely, yet does not deprive her of her rights which she acquired in good faith, and without intention of defrauding creditors of J. D. Stone. In no proper sense were the plaintiffs creditors of Stone. The judgment evidently was recovered against him upon the ground that he in bad faith had purchased the stock of goods and accounts of Woodruff and thereby defeated the plaintiffs of their just dues. That is an action for tort, and while no doubt a recovery may be had in such case it is because of the wrong done to plaintiffs. This question does not arise, but the testimony fails to show that any creditor has been defrauded.

It seems that the judge of the district court made a sup-

 Smith v. Wigton.

plemental order for the examination of Sarah, while this action was pending, without requiring notice to be given to her or her attorney; that an attorney for the plaintiff, with a short-hand reporter, went to her residence and administered to her an oath and then proceeded to question her in regard to the transaction, and the substance of that testimony is in evidence on behalf of the plaintiffs. No court should grant an order of that kind except upon notice. It is evident that the order was obtained without notice and the whole proceedings were *ex parte*. We do not care to comment on such procedure. Upon the whole case it is apparent that the defendant Sarah is a *bona fide* purchaser and is entitled to protection. The judgment of the district court is reversed and the action dismissed.

REVERSED AND ACTION DISMISSED.

THE other judges concur.

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| 35 | 460 |
| 39 | 186 |
| 35 | 460 |
| 59 | 733 |

WILLIAM G. SMITH V. WIGTON & WHITHAM.

[FILED OCTOBER 26, 1892.]

1. **Pleadings: AMENDED SUPERSEDE ORIGINAL.** Defendant having filed an answer to the petition, and plaintiff thereupon filing an amended petition, to which defendant answers without making the original answer part of the second answer, the case stands for trial on the amended pleadings, and the original pleadings are disregarded.
2. **Action for Money Had and Received: DEFENSE UNDER CONTRACT MUST BE PLEADED.** Where the defendant claims money as due him under a contract with the plaintiff, he must plead the facts showing his right to retain the same.
3. ———: **PLEADINGS: GENERAL DENIAL: FACTS IN ISSUE.** In an action in substance for money had and received, a general denial only puts in issue the receipt of the money.

ERROR to the district court for Madison county. Tried below before NORRIS, J.

H. C. Brome, for plaintiff in error.

J. B. Barnes, *contra*.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendants to recover the sum of \$3,500.47 with interest and costs. The amended petition is as follows:

"Comes now the plaintiff and by order of court files this his amended petition, and for cause of action against the defendant states:

"First—That on or about the 23d day of March, 1888, the defendant received from the clerk of the district court of Platte county, Nebraska, the sum of ten thousand seven hundred and ninety-five and $\frac{25}{100}$ dollars to and for the use of plaintiff.

"Second—That on or about the 2d day of April, 1888, and before the commencement of this action, plaintiff demanded an accounting, settlement, and payment thereof from the defendants.

"Third—That the defendants have failed to account for or pay over to said plaintiff any part of said sum except the sum of \$7,668.50, leaving a balance still due, owing, unpaid, and not accounted for to this plaintiff, amounting to three thousand one hundred twenty-six and $\frac{75}{100}$ dollars, which last named sum the defendants refuse to pay plaintiff.

"Fourth—That said defendants did not obtain said money from said clerk of the district court of Platte county, Nebraska, under or by virtue of any contract with this plaintiff.

"Wherefore plaintiff prays judgment against the defendants for the sum of three thousand one hundred and twenty-six and $\frac{75}{100}$ dollars, and interest thereon at seven per cent per annum from March 23, 1888, and the costs of suit."

It appears that prior to the filing of the amended peti-

Smith v. Wigton.

tion, the plaintiff had filed a petition in which he did set out in substance a contract of employment of the defendants, and that they had prosecuted the suit to judgment, and collected thereon the sum of \$10,795.28, forty per cent of which was to be retained as attorney fees; that they had paid the plaintiff the sum of \$5,225, leaving a balance due the plaintiff of the sum of \$1,251.67, with interest and costs.

The answer to the amended petition is a general denial. In the first answer the contract is denied, but it is alleged that the plaintiff was unable to pay the expenses of the suit, and that the defendants loaned the plaintiff money to pay the same, to-wit, the sum of \$344.30, which sum was to be deducted from the amount of the plaintiff's judgment. They also allege that instead of forty per cent of the judgment they were to have fifty per cent. We are unable to see any benefit the parties can derive from the original pleadings. Where amended pleadings are filed, the case is tried upon the amended pleadings alone. (*Bank v. Telegraph Co.*, 30 O. St., 555; Maxw., Code Pl., 583.) An amended answer supersedes the first answer. (*Reihl v. Likowski*, 33 Kan., 515.)

Second—The issue presented by the amended pleadings is the receipt and retention of more than \$3,000 of plaintiff's money by the defendants. The proof clearly shows that they collected more than \$10,000 on a judgment recovered in favor of the plaintiff and that they still retain more than \$3,000. If this is retained in pursuance of a contract to that effect it should be pleaded. It is properly a matter of defense as a justification by the defendants for retaining the money. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. ROYAL ARCANUM, V.
THOMAS H. BENTON, AUDITOR.

[FILED OCTOBER 26, 1892.]

LIFE INSURANCE: SECRET BENEVOLENT ORDERS: AUDITOR'S CERTIFICATE: FEES. A secret benevolent order, which issues certificates of indemnity solely to its members, whereby the order obligates itself to pay a stipulated sum on the death of any member to his widow or children, or other persons dependent upon him, upon complying with all the requirements of chapter 18, session laws of 1887, is entitled to a certificate from the auditor authorizing it to transact business in this state without paying the fees specified in section 32 of chapter 43 of the Compiled Statutes.

ORIGINAL application for *mandamus*.

Weaver & Giller, for relator.

George H. Hastings, Attorney General, *contra*.

NORVAL, J.

This is an original application to this court for a peremptory *mandamus* to compel the respondent to issue to relator a certificate of authority to transact business in this state.

Relator is a secret benevolent and fraternal society, incorporated under the laws of the state of Massachusetts, the management and control of which is confined exclusively to its members, a part of whom are residents and citizens of this state. The object and purpose of the society, in addition to its benevolent and fraternal features, is to issue certificates of indemnity to its members, promising to pay a specified sum of money, in case of the death of any of its members, to the widow, orphan, or other person dependent upon such member, all of which business

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is done by and through councils, located in this and other states of the Union.

It is stipulated that relator has a sufficient membership to pay its certificates in full in case of the death of any of its members, by the usual mode of assessment; that it has filed a certificate in the office of the auditor of public accounts of this state, setting forth the total number of its members in good standing, the title and post-office address of each of its chief officers, its method of assessment upon which funds are provided to pay the certificates of indemnity by it issued, together with a certified copy of its constitution and by-laws; that on or about March 9, 1891, relator filed with the auditor a sworn statement, setting forth the total number of members in good standing on the first day of January, preceding; the total number of members who have been suspended for the non-payment of dues and assessments for the preceding twelve months, together with the amount of money paid to each, and the number of claims resisted, and the reason for resisting the payment thereof; the total amount collected for the payment of certificates of indemnity, and the amount due and unpaid upon certificates of deceased members; the total amount on hand in such fund, and the amount paid out of such fund; that relator has in all respects complied with the requirements of chapter 18, Session Laws, 1887, the same being "An act to exempt secret societies and associations from the requirements of chapter sixteen (16), of the Compiled Statutes of 1885, to define the duties, powers, and obligations of such societies and associations, and to provide penalties for violations thereof."

Respondent refuses to issue his certificate to the relator, for the sole reason that relator refuses to pay the fees provided by section 32, chapter 43, Compiled Statutes, which reads as follows:

"Section 32. There shall be paid by every company, association, person or persons, agent or agents, *to whom this*

State, ex rel. Royal Arcanum, v. Benton.

act shall apply, the following fees: For examination and filing of the first application of any company, and issuing of the certificate of license thereon, fifty dollars, which shall go to the auditor; for filing each annual statement herein required, twenty dollars; for each certificate of authority, two dollars; for every copy of paper filed as herein provided, the sum of ten cents per folio, and fifty cents for certifying the same and affixing the seal of office thereto; all of which fees shall be paid to the officer required to perform the duties."

It will be perceived that the above quoted provisions, in express terms, only apply to such insurance companies, associations and persons as come within the purview of the act, of which said section is a part. The requirements of chapter 43 of the Compiled Statutes do not apply to secret societies or associations of the character of the relator, but such societies and associations are governed and controlled exclusively by the provisions of the legislative enactment of 1887 above referred to. Although said act requires the auditor to issue his certificate to transact business in this state to every secret society or association which, in addition to its fraternal and benevolent features, shall issue certificates of indemnity, obligating said society or association to pay a specified sum of money, in the event of the death, sickness, or disability, of any of the members thereof, to the wife, widow or orphans, or persons dependent upon such members, upon such society or association complying with all the requirements of said act, we are unable to find any provision therein authorizing the auditor to require or exact a fee for the issuing of his certificates to secret fraternal benevolent societies having an insurance feature. While the certificates of indemnity issued by societies of the kind and character of relator are, in form and substance, contracts of insurance, our conclusion is that such societies are not amenable to the provisions of said chapter 43 regulating insurance companies, and, there-

 Norton v. Neb. Loan & Trust Co.

fore, relator is not required to pay the fees mentioned in section 32 of said chapter. It follows that, as the relator has complied with all the requirements of the statutes on its part to be complied with, it is entitled to a certificate authorizing it to do business in this state. Judgment must be entered in accordance with the prayer of the petition.

WRIT ALLOWED.

The other judges concur.

W. C. NORTON V. NEBRASKA LOAN & TRUST COMPANY ET AL.

[FILED OCTOBER 26, 1892.]

1. **Judicial Sales: CAVEAT EMPTOR.** It is a well settled rule that the doctrine of *caveat emptor* applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. He is bound to examine the title, and not rely upon statements made by the officer conducting the sale, as to its condition. If he buys without such examination, he does so at his peril, and must suffer the loss occasioned by his neglect. MAXWELL, CH. J., dissenting.
2. ——— : ——— : **DEFECTIVE TITLE: NOTICE.** A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the records disclose.

ERROR to the district court for Butler county. Tried below before POST, J.

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| 35 | 466 |
| 40 | 395 |
| 35 | 466 |
| 43 | 202 |
| 35 | 466 |
| 45 | 76 |
| 35 | 466 |
| 49 | 278 |
| 51 | 664 |
| 53 | 382 |
| 54 | 719 |
| 54 | 721 |
| 35 | 466 |
| 40 | 394 |
| 58 | 447 |
| 35 | 466 |
| 60 | 211 |

S. S. McAllister, for plaintiff in error, contending that the bidder at foreclosure sale, having acted under mistake, and on misrepresentation of the sheriff as to title, should be relieved from the performance of his bid, cited: *Paullett v. Peabody*, 3 Neb., 196; *Frasher v. Ingham*, 4 Id., 531; *Laight v. Pell*, 1 Edw. Ch. [N. Y.], 577; *Yates v. Little*, 6 McLean [U. S. C. C.], 511.

Steele Bros., contra: Court of equity will not interfere where party seeking relief is guilty of negligence. (2 Pomeroy, Eq. Jur., 839; *Young v. Morgan*, 13 Neb., 48.) Neglect of purchaser to examine records deprives him of right to relief. If he knew of the defect, or from pursuing inquiries suggested by the pleadings, or the notice of sale, would have known it, he is not entitled to be relieved. (2 Freeman, Executions, sec. 304k.) Equity will not grant relief for mistakes of law. (*Smith v. Pinney*, 2 Neb., 144; *Boggs v. Hargrave*, 16 Cal., 559; *Spafford v. Janesville*, 15 Wis., 526; *Landon v. Burke*, 33 Id., 453.) The return shows the bid was unconditional, and it is conclusive. (*Johnson v. Jones*, 2 Neb., 133; *Cooper v. Sunderland*, 3 Ia., 114; *Trimble v. Longworth*, 13 O. St., 431; *Granger v. Clark*, 22 Me., 128; *Cook v. Darling*, 18 Pick. [Mass.], 393; *Lightsey v. Harris*, 20 Ala., 411; *Hill v. Kling*, 4 O., 137; *Philips v. Elwell*, 14 O. St., 240.) If the sale was conditional the return is wrong, and the bidder's remedy is against sheriff for false return. (*Angier v. Ash*, 6 Foster [N. H.], 105; *Diller v. Roberts*, 13 Serg. & R. [Pa.], 60; *Bott v. Burnell*, 11 Mass., 165; *Whitaker v. Sumner*, 7 Pick. [Mass.], 555; *Barrett v. Copeland*, 18 Vt., 69; *Wilson v. Exr. of Hurst*, 1 Pet. [U. S. C. C.], 441; *Egery v. Buchanan*, 5 Cal., 56; *Cozine v. Walter*, 55 N. Y., 304.) The rule *caveat emptor* applies in all its rigor to judicial sales. (*The Monte Allegre*, 9 Wheat. [U.S.], 616; *Corwin v. Benham*, 2 O. St., 36; *Owsley v. Smith*, 14 Mo., 153; *Mason v. Wait*, 4 Scam. [Ill.], 127; *Worth-*

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ington v. McRoberts, 9 Ala., 297; *Fox v. Mensch*, 3 Watts & Serg. [Pa.], 444; *Mellen v. Boarman*, 13 S. & M. [Miss.], 100; *Lynch v. Baxter*, 4 Tex., 431; *Bingham v. Maxcy*, 15 Ill., 295; *Vandever v. Baker*, 13 Pa. St., 124; *Anderson v. Foulke*, 2 Har. & G. [Md.], 346; *Thompson v. Munger*, 15 Tex., 523; *Bickley v. Biddle*, 33 Pa. St., 276; *Strouse v. Drennan*, 41 Mo., 289; *Walden v. Gridley*, 36 Ill., 523; *Creps v. Baird*, 3 O. St., 278; *Miller v. Finn*, 1 Neb., 255; *Frasher v. Ingham*, 4 Neb., 531.)

NORVAL, J.

The Nebraska Loan & Trust Co. brought suit in the district court of Butler county against Byron E. Taylor and Lila A. Taylor, his wife, to foreclose a mortgage upon the south half of section 12, in township 15 north, of range 1 east, executed by the Taylors, which mortgage was junior and subject to a prior mortgage of \$3,000, on said real estate, owned and held by one Washington Quinlin. The court found there was due the Loan & Trust Company on its mortgage the sum of \$1,056.60; that said Quinlin had the first lien on said premises for \$3,000 with interest thereon at six per cent from July 1, 1888, and a decree of foreclosure was rendered, which directed the sale to be made subject to the lien of Quinlin. Subsequently an order of sale was issued, and the land, after being duly appraised and advertised, was sold by the sheriff to one W. C. Norton, the plaintiff in error herein, for the sum of \$2,535. The sale was reported by the sheriff to the court and the same was approved and confirmed. Shortly thereafter, at the same term of court, the purchaser filed a motion to vacate and set aside the sale on the ground that he was induced to purchase the property by reason of certain representations made by the sheriff and the clerk of the district court as to the character of the title the purchaser would acquire. The motion was overruled, and Norton was ordered to pay into court the amount of his bid. To reverse said order Norton prosecutes a petition in error to this court.

It appears from the affidavits filed in support of the motion to set the sale aside, that Mr. Norton came to the place where the sheriff was offering the property for sale, and inquired what he was selling, to which the officer replied that it was the B. E. Taylor land, and requested Norton to make a bid thereon; that Norton thereupon asked what amount must be bid to get the land, to which the sheriff replied that under the appraisement it could not be sold for less than \$2,533.60, as that was two-thirds of the appraised value, and that by paying said sum he would acquire a good and perfect title to the land, free from all liens; that the sheriff and Norton then went to the office of the clerk of the district court to ascertain what amount was against the land, and the clerk, after examining the papers, told Norton he would have to bid \$2,533.60 to get the land, but he had better make the bid \$2,535 even, and thereby get a little above two-thirds of the appraised value; that the payment of said sum would clear the land of all prior liens and incumbrances; that relying upon said statements Norton made a bid of \$2,535, and the land was struck off to him at said sum.

On the next day, the sheriff, on meeting Norton, said to him that the amount of his bid was not two-thirds of the appraisement; that the land had been appraised at \$4,800 and could not be sold for less than \$3,200, and that unless Norton would raise his bid to said sum he could not have the land; whereupon Norton replied he would not bid the sum of \$3,200, and the sheriff then stated that such sale must be declared off. It also appears that the statements of the sheriff and clerk were innocently made and without any intention to mislead or deceive the purchaser. It is also shown by uncontradicted testimony that the land was well worth \$6,400.

The object and purpose of the plaintiff in error is to set aside a sheriff's sale on the ground that he did not thereby acquire the title which he at the time supposed he was pur-

chasing. No claim is made that either the plaintiff in foreclosure, or Taylor, or his wife, was guilty of any fraud, or that any representations were made by either of them to Norton, as to the character of the title to the land, or that they had any knowledge at the time of the purchase of the statements and representations made by the clerk and sheriff. The only proposition presented is whether the fact of the sheriff and clerk having represented to Norton that, if he would buy the land, he would get a clear and perfect title thereto, free from liens, although such representations were untrue, was sufficient to require the court to set aside the sale. In our view, under the facts disclosed by this record, and the law applicable thereto, plaintiff in error is not entitled to any relief. Ordinarily a purchaser at sheriff's sale takes all risks. He buys at his peril, and if the title is bad, he must stand the loss. The rule of *caveat emptor* applies in all its force to all judicial sales. The court undertakes to sell the title of the defendant, such as it is, and it is the duty of the purchaser to ascertain for himself the character of the title he is about to acquire. (*Miller v. Finn*, 1 Neb., 254; *Smith v. Painter*, 5 S. & R., 225; *Vattier v. Lytle's Exrs.*, 6 O., 478; *Lewark v. Carter*, 117 Ind., 206; *Corwin v. Benham*, 2 O. St., 36; *Mason v. Wait*, 4 Scam. [Ill.], 127; *Bishop v. O'Conner*, 69 Ill., 431; *Sackett v. Twining*, 57 Amer. Dec., 599; *Lynch v. Baxter*, 4 Tex., 431.)

An exception to the rule above stated, recognized by the weight of authorities, is where the purchaser has been induced to bid by fraud, or under a mistake of fact. A purchaser will be released from the sale on the ground of a mistake of fact, when the mistake is not the result of his own negligence, if application therefor is made at the proper time; but he will not be released from his purchase on his mere ignorance or mistake of law. (*Haden v. Ware*, 15 Ala., 149; *Burns v. Hamilton*, 33 Id., 210; *Hayes v. Stiger*, 29 N. J. Eq., 196; *Upham v. Hamill*, 11 R. I.,

565.) The facts do not bring the case at bar within the exception to the rule, so as to entitle Norton to have the sale set aside. Neither the clerk nor sheriff misrepresented any material fact concerning the condition of the title. They did not inform the purchaser that there were no incumbrances upon the property, nor does Norton claim that he was not aware of there being a prior mortgage of \$3,000 on the premises at the time he made his bid. The clerk and sheriff supposed that the sale would extinguish all incumbrances and that the purchaser would acquire a perfect title to the property. In so informing Norton, they misstated the law, or the legal effect of the foreclosure proceedings and sale, and for which the law affords no relief.

We think plaintiff in error is concluded by his own neglect. He had no right to rely upon the statements of the clerk and sheriff, but should have had the title and the proceedings under which the sale was made examined for himself, before he made his bid. Had he done so, he would have been fully apprised of the condition of the title. The records of the county and of the court are open to inspection to every one, and these records disclose the objection now urged to the title of the lands. Had an examination been made of either the petition to foreclose the mortgage, the decree, the appraisement, certificate of liens, or notice of sale, he would have ascertained that Washington Quinlin had a first lien upon the premises for \$3,000 and interest, and that the sale was to be made subject thereto. If Norton was deceived, it was the result of his own negligence in not taking the precaution to examine the records. He is chargeable with knowledge of their contents. Equity will not relieve a purchaser of his own negligence. (*Roberts v. Hughes*, 81 Ill., 130; *Vanscoyoc v. Kimler*, 77 Ill., 151; *Riggs v. Pursell*, 66 N. Y., 193; *White v. Seaver*, 25 Barb., 235; *Eccles v. Timmons*, 95 N. C., 540; *Weber v. Herrick*, 26 N. E. Rep. [Ill.], 360; *Dennerlein v. Dennerlein*, 19 N. E. Rep. [N. Y.], 85.)

In *Eccles v. Timmons*, *supra*, it is held that a purchaser at a judicial sale will not be released from his bid on the ground that the title is imperfect, when the true state of the title is set out in the pleadings under which the sale was made.

Dennerlein v. Dennerlein, 19 N. E. Rep., 85, was a partition sale. The property was described in the proceedings and in the notice of sale by metes and bounds and as "containing 31 acres, be the same more or less." Prior to the sale, hand-bills were issued in the name of the referee who made the sale, in which the boundary lines of the premises were omitted, and the property was described as "the farm of the late John Dennerlein, containing 31 acres." The purchaser, in bidding upon the property, relied upon the statement in the hand-bills as to the quantity of land. Subsequently he discovered that the premises only contained $24\frac{3}{4}$ acres, and applied to the court for an order releasing him from completing the purchase on the ground that he had been misled as to the number of acres, which motion was denied. He appealed to the general term, where the order was affirmed, and, on appeal to the court of appeals of New York, it was held that he was not entitled to relief.

Vanscoyoc v. Kimler, *supra*, was an appeal from an order of the circuit court, sustaining a motion made therein by the purchaser, to set aside a sale of a tract of land made upon execution, on the ground that he was led to believe, by misrepresentations made by the officer conducting the sale, that the land was not incumbered, when in fact it was mortgaged in excess of its value. The supreme court held that the maxim of *caveat emptor* applied, and that the misrepresentation of the sheriff afforded no ground for setting aside the sale.

In the case at bar the price paid was so greatly inadequate to the real value of the land as to put the purchaser on inquiry. He should have known that a half section of

land, which the evidence shows was well worth \$6,400, would sell for more than \$2,535, the amount of his bid, if there was no prior incumbrance. The land was actually worth several hundred dollars more than the amount bid by Norton and the Quinlin lien combined, so that, instead of losing anything by the transaction, the investment is still a profitable one. He does not complain that he has lost anything by the transaction, but rather that he failed to double on the investment.

Concerning what took place between the sheriff and Norton the day following the sale, to which reference has been made, we will say that it is unexplainable how the former made the statements he did, if correctly quoted in Mr. Norton's affidavit, in regard to what the land was appraised at. It is not true that it had been appraised at \$4,800, and could not be sold for less than \$3,200. The sum bid by Norton was more than two-thirds the appraised value of the land, as shown by the appraisement. However, what the sheriff may have said in that regard, as well as the statement that "the sale must be declared off," is of no importance, for the reason that the status of Norton, as purchaser, was fixed when his bid was accepted; the officer had no power or authority to afterwards release him from his purchase.

It is contended that this case falls within, and is controlled by, that of *Paulett v. Peabody*, 3 Neb., 196, and *Frasher v. Ingham*, 4 Id., 531. We do not think so. These cases were decided upon facts materially different from this. In the first case there was a decree of foreclosure of a junior mortgage, in a suit wherein the senior mortgagee was not a party. The property was sold under the decree by the sheriff, the purchaser being induced to buy the property through the false representations of the attorneys of both the plaintiff and the senior mortgagee, that the junior mortgage would be paid off out of the proceeds of the sale, and that he would take the property dis-

Norton v. Neb. Loan & Trust Co.

charged of such lien. It was held that said false representations of the parties were sufficient grounds for vacating the sale. In the case we are considering it is not pretended that any misrepresentations or fraud can be imputed to any of the parties to the suit, or to Quinlin, the senior mortgagee, whereby Norton was induced to buy the land. Of course, when a fraud is practiced upon the purchaser at a judicial sale by the party in interest, which induced the purchaser to make his bid, the sale will be set aside therefor. But the rule has no application here.

In the case reported in 4th Nebraska the sheriff levied an execution upon, appraised, and sold, a tract of land covered with timber. The sale was duly confirmed and a deed executed to the purchaser. Afterwards it was discovered that the record of the proceedings under the writ described another tract near by, which was of no value whatever. It was held, on a petition of the purchaser to set aside the sale, that he was entitled to relief. Clearly the case is not analogous to the one before us, for in this case there was no error in describing the lands, as in the case cited. The doctrine announced in these decisions should not be extended to cases not clearly of their class.

We are of the opinion that the district court did not err in overruling the motion of the plaintiff in error to set the sale aside, and its decision is

AFFIRMED.

POST, J., did not sit.

MAXWELL, CH. J., dissenting.

I am unable to give my assent to the opinion of the majority of the court, and will, as briefly as possible, state my reasons for failing to concur with the majority.

This is an application to compel the purchaser of land under a decree of foreclosure of a mortgage to complete the purchase by paying the amount of his bid.

He answers, in effect, that he was induced to bid by the

misrepresentations of the officer conducting the sale, and that a large mortgage, viz., \$3,000, exists as an incumbrance against the land which he was induced to believe would be satisfied out of the proceeds of sale.

The cause was submitted to the court on affidavits as follows:

“W. C. Norton, being first duly sworn according to law, deposes and says that on the 14th day of September, 1889, while the sale was being made of the lands sold under the order of sale in this case, this affiant had a conversation with the sheriff of said county, who was then and there conducting the said sale, wherein said sheriff stated to this affiant that said land, under the appraisement, could not be sold for less than \$2,533.60, and that, under the appraisement, said last named amount would be sufficient to buy the same; that said sheriff then and there examined the report of the appraisers, the certificates of the county clerk, clerk of the district court, and county treasurer, and, after making said examination, and after figuring up the amount of the decree, and the amount of liens on said lands, stated to this affiant that the said sum of \$2,533.60 would be sufficient to purchase said land, and that, by paying the said sum of \$2,533.60, this affiant would acquire a good and perfect title to said land, free and clear of all previous liens or incumbrances. This affiant then and there trusted and believed the said statement and representation of said sheriff, and then and there believed that by bidding the sum of \$2,535.00 for said land, paying the said sum of \$2,535.00 therefor, he would receive and have a good title to said land, free and clear of all other liens and incumbrances thereon. Said affiant then and there stated to said sheriff that he would give the sum of \$2,535.00 for said land if he thereby would acquire a clear deed and title to said land, free of all prior liens and incumbrances; that said sheriff then and there stated that this affiant would acquire such a deed and title.

"Affiant says that the clerk of this court, Ed. G. Hall, was also present when said sheriff stated to this affiant that a bid of \$2,535 would entitle the purchaser to a deed for said land, and that the payment of said \$2,535 would clear said land of all prior liens and encumbrances and that said Ed. G. Hall then and there assisted said sheriff to look over and examine said appraisement and certificates, and assisted to figure up the amount of said decree and said liens, and the said Ed. G. Hall also then and there, before the time he, this affiant, bid the said sum of \$2,535, stated that said sum of \$2,535 was more than two-thirds of the appraised value of said land, and that by bidding the said sum of \$2,535, he would be entitled to a deed therefor, and that a deed under said bid would entitle the purchaser to a deed free and clear of all prior liens and encumbrances; that this affiant then and there believed and trusted in the said statements and representations of said sheriff and said clerk, and acted upon their said statements and representations in making said bid.

"Affiant says that said sheriff and said clerk stated to said affiant that no bid less than \$2,533.60 could be received for said land, stating that said last named amount was two-thirds of the value of said land, and that after the payment of said amount there would be no prior liens on said land.

"That on the next day, after bidding said sum of \$2,535 for said land, to-wit, on the 15th day of September, 1889, he met said sheriff, whereupon said sheriff stated to this affiant that the said amount bid by this affiant, to-wit, \$2,535, was not two-thirds of the appraised value of said land; that said land had been appraised at the sum of \$4,800, and could not be sold for less than \$3,200, and that unless he, this affiant, would raise his said bid to the said sum of \$3,200, he, said sheriff, could not sell said land to this affiant, whereupon said affiant stated to said sheriff that he, this affiant, would not bid the said sum of \$3,200;

that said sheriff then stated to this affiant that said sale must be declared off, and no sale, as he, said sheriff, could not sell said land for less than \$3,200; that this affiant then and there believed that his said bid of \$2,535 was wholly rejected by said sheriff, and he would not be held to act upon said bid or pay for said land, and paid no more attention to said pretended purchase, and did not suppose or anticipate that any effort would be made to confirm said sale, offer or bid, and was not present in court when said sale was confirmed, and had no notice that an application would be made to this court to confirm said sale, and was not in the court room and not in Butler county when the sale was confirmed; that if he had known or supposed that an application was going to be made to this court to ratify or confirm his said bid, he would have appeared by counsel and have opposed said confirmation on the ground, and for the reason, that in fact he was misled and deceived by the said statements and representations of said sheriff and said clerk in this, to-wit:

“First—That the decree under which said land was sold was not a first lien on said land; that in fact there was a prior lien on said land amounting to the sum of \$3,000, and that said land was sold subject to said prior lien of \$3,000, which said prior lien of \$3,000 consists of a mortgage given thereon by Byron E. Taylor and wife to the Nebraska Loan & Trust Co., which said mortgage is in full force and effect and not yet due.

“Second—That said land, or the interest therein of said Byron E. Taylor and wife, was not appraised at the sum of \$3,800 as stated by said sheriff, and said clerk, at and before the time of said bid, but that said interest of Byron E. Taylor and wife, in said premises was appraised at the sum of \$1,478.64, and that in fact said land could have been bought at said sale for two-thirds of said last named amount, as fully appears by the records and files in this proceeding.

“That if this affiant had known the true condition of liens and incumbrances on said land, and had been correctly informed of the true condition of affairs regarding liens and incumbrances on said land, by said sheriff and said clerk he would not have purchased or bid on said land, and had he known or supposed that an application was about to be or going to be made to this court to confirm said sale, and had he not been misled by the said sheriff, telling this affiant that he, said sheriff, could not accept said bid, he, this affiant, would have at once, and before the confirmation of this sale, taken steps to examine and determine the regularity of said sale, and the reasonable or unreasonable extent of his said bid, that he had no knowledge or information that an application had been made to confirm said sale, until after the same was confirmed by this court, whereupon he at once took steps to institute this motion, and says that a great wrong, hardship, and injustice will be done this affiant if he is compelled to pay the amount of his said bid or offer, and that said bid or offer was made under a misapprehension of the true facts surrounding said bid or offer, as stated and recited in this affidavit.

W. C. NORTON.”

“I, Ed. G. Hall, being first duly sworn, depose and say: I am the clerk of the district court of Butler county, Nebraska, duly qualified and acting as such, and was on the 14th day of September, 1889. And on the said 14th day of September the sheriff of Butler county was making sale of one Byron E. Taylor's farm, by virtue of an order of sale in the above entitled cause.

“That during the time of said sale the said sheriff came to my office, and I asked him, ‘Have you a bidder for the land?’ He answered, ‘No; I have not, but I think Norton is going to buy it.’ He then went out, and shortly after, W. C. Norton came to my office and asked me how much there was against the Byron E. Taylor farm. Before having time to answer, the sheriff returned, and together with said

Norton, seated themselves at a desk in my office. While at the desk I heard said Norton say to the sheriff, 'If you'll make me a clear title to the land I will buy it.' The sheriff then said, 'I will make you a sheriff's deed.'

"I then said, 'a sheriff's deed is as good a deed as can be made'; that his, said Norton's, title, would be perfectly good upon receipt of a deed of that kind. I then picked up from the desk the order of sale and certificates attached and said to the said Norton, 'I will tell you in a minute what you'll have to pay to get the land;' but upon looking over the papers did not find the said appraisement, and being in a hurry asked the sheriff what the appraisement was; he replied that it was \$—— .

"I then said to said Norton, 'You'll have to pay two-thirds of this amount, which will be \$2,533.60.' and I further said to the said Norton, 'You had better make the bid \$2,535, even; you'll be sure then to cover everything.' I also told said Norton that all other liens would be canceled as against this land when the sale was confirmed, not knowing at that time that said sale was being made subject to the lien of Washington Quinlin for \$3,000, but did know that said lien and mortgage did exist but believed and told said Norton that said lien would be no good if the sale was confirmed under his bid, and further, this affiant sayeth not.

ED. G. HALL."

It will be observed that Norton applied to the clerk who should have had the appraisement if the sheriff had done his duty. The appraisement would have shown what liens existed against the land. The sheriff did not seem to have it in his possession. In view of the course he pursued afterwards it is probable that he had a design in suppressing the appraisement.

"I, Sumner Darnell, being first duly sworn, depose and say that I am the sheriff of said county, duly qualified and acting as such; that on the 14th day of September, 1889, while I was offering the land described in the order of

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sale in the above named cause for sale, under an order of sale issued in the above entitled cause, on the 12th day of July, 1889, one W. C. Norton came to me and said, 'What is this you are selling?' I says, 'A farm.' He says, 'What farm?' and I says, 'E. B. Taylor's.' He says, 'What have you been offered?' I told him, 'I have no bid yet,' and asked him to make a bid. He, Norton, said, 'What is there against it?' Then I told him to go up stairs to the clerk of district court, Ed. G. Hall, who is there in his office and see for himself. Then he, Norton, says, 'If you will make me a clear title, I'll give you \$——.' Then he went up stairs to the office of the clerk of said district court. In a few minutes I followed. I asked him what he had found out. Ed. G. Hall, the said clerk, said, 'It will take \$2,533.60 to make two-thirds of the appraised value.' Then Ed. G. Hall says, 'You had better make it \$2,535, and make sure that the amount is sufficient for the two-thirds of the appraised value.' And I, believing that the two-thirds of said appraisement was \$2,533.60, and being in good faith that that was the least amount that would buy said land at said sale, said, 'Yes, you had better make it \$2,535,' and he, Norton, said, 'Well, I'll raise it that much if you'll make me a good deed.' I said, 'I'll make you as good a deed as a sheriff can make,' or words to that effect. Then I went down stairs, and receiving no other bid, declared it sold to W. C. Norton. The next day, the 15th of September, or within a day or so after, I met said W. C. Norton and told him there was a mistake, and that his bid was not two-thirds of the appraised value of said land, and the sale would not be confirmed, as I believed. And then he said, 'I will not raise my bid,' and 'I will not take the land;' that said W. C. Norton made no other bid than the offer I have above described.

SUMNER DARNELL."

As an offset to these affidavits a number of persons were permitted to swear that the land in question was of greater

value than the amount fixed by the appraisers, and was worth from \$15 to \$20 per acre.

It is very clear to my mind that if the testimony of the witnesses swearing to the increased value is true, that it is an additional reason why the sale should be set aside, because the land-owner is being defrauded.

As an evidence that the testimony is not true, however, the land-owner, as well as the trust company, is here insisting on the performance of the contract, evidently believing that the property would not bring as much if again offered for sale; but even if the affidavits are true as to the value, they cannot be considered in this case.

Suppose the plaintiff in error to be a man of very limited means who desired the land for a farm and was able to procure a loan thereon, if free and unincumbered, for \$3,000, but utterly unable to obtain a loan for any greater sum. In a case of that kind it would be possible to rob him of every cent he possessed by compelling him to accept property subject to a heavy incumbrance when he had no means of satisfying the same. It will not do to say that the plaintiff in error possesses sufficient means and is able to satisfy the incumbrance, because the same rule must apply to rich and poor alike, and both will suffer by the proposed rule. It will be observed that the majority opinion is predicated almost wholly upon sheriffs' sales under executions in actions at law, or in partition cases.

The case of *Eccles v. Timmons*, 95 N. C., 540, cited in that opinion, was a partition case, and the title of the various parties was set out in the petition. In that case the petition evidently contained a condensed statement of the title of the several parties, and the objection was not made for many months after the purchaser had taken possession, and not until a payment was due. It is said: "It will be observed that the title of the defendant-tenants is set out in the petition, and a copy of the deed under which they derive it annexed thereto. With the information thus

furnished, or of easy access, the purchaser bids for the lot, pays part of the purchase money and secures the residue by a note with the allowed credit. This credit expired on December 1, 1885, and seven months thereafter, when served with a notice of a demand for judgment, for the first time the defense is set up of an imperfect title to the lot.

"It is not a case when, upon the face of the pleadings, a perfect title purports to be sold that is afterwards discovered to be defective, when the court will relieve and not compel the purchaser to pay for what he does not get. But the true state of the title appears in the averments in the petition itself, so that every bidder may know by examination what estate he will acquire in the land, and his bid must therefore be regarded as his own estimate of the value of what he may buy, and the court may direct thereafter to be conveyed.

"A sale by the master in a case of this kind (for partition), says Ruffin, C. J., in *Smith v. Brittain*, 3 Ired. Eq. [N. C.], 347 (351), 'is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invitum* of such interest as the party has or may have in which the rule is *caveat emptor*, but professes to be a *sale of a particular estate*, stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only. Thereupon, if there be no such title, the purchaser has the same equity against being compelled to go on with his purchase, as if the contract had been made without the intervention of the court, for, in truth, the title has never been judicially passed on between persons contesting it."

It seems to me the case is directly against the majority opinion in this case. A sheriff is the officer provided by law in each county to execute the ordinary process of the court. His duties are clearly pointed out by statute, while to a considerable extent he is under the control of the court, yet he does not derive his power from it. Where,

however, a court renders a decree of foreclosure, it directs the sale to be made by some particular person; not necessarily the sheriff. This person may be the sheriff, but if so it is because he is designated by the court to make the sale, and not because the duty devolves upon him as sheriff.

A sale under a decree of foreclosure under the former chancery practice was made by a master in chancery or some one designated by the court; and the same rule prevails under the Code, except that the office of master has been abolished and the court is authorized to appoint a commissioner to conduct the sale. In either case the sale is made by the court and the person conducting the sale is the agent of the court.

In *Veeder v. Fonda*, 3 Paige [N. Y.], 97, it is said: "As property to a vast extent is sold under the decrees and orders of this court, much of which property belongs to infants, and others who are not able to protect their own rights, it has always been an important object with the court to encourage a fair competition at master's sale. For this purpose it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them. That in a contract between them and the court, they will not be compelled to carry that contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such individual or his agent. It is, therefore, the principle of the court that the master who sells the property shall not, in the description of the same, add any particular which may unduly enhance the value of the property, or mislead the purchaser."

To the same effect is *Post v. Leet*, 8 Paige Ch. [N. Y.], 337; *Seaman v. Hicks*, Id, 656. In the last case cited it is said: "The terms of sale show that the land was sold as and

for a good title, except as to the incumbrance mentioned. The court therefore ought not to compel the purchaser to complete his purchase unless he would have obtained under the master's deed such an interest, both in the land and in the buildings thereon, as he was authorized to suppose he was buying when the property was struck down to him upon his bid." The court in that case, however, reached the conclusion that the title was as represented and required the purchaser to perform. See also *Kauffman v. Walker*, 9 Md., 229; *Merwin v. Smith*, 1 Green Ch. [N. J.], 182; *Den v. Zellers*, 2 Halst. [N. J.], 153*; *Hodgson v. Farrell*, 2 McCart. [N. J.], 88.

Many other cases to the same effect might be cited. Where a sale is conducted by a commissioner under a decree of foreclosure, the commissioner represents the court. He is the hand of the court, so to speak, by which the decree is carried into effect. Any misrepresentations made by him, even if innocently made, but by reason of which the purchaser has been induced to bid and will not acquire the interest which he is led to believe he would acquire are sufficient to justify setting the sale aside. This, so far as I am aware, is a uniform rule in courts of equity that if the person who conducted the sale made misstatements, either honestly, ignorantly, or intentionally, whereby the purchaser was deceived, and would be defrauded, the sale will not be sustained against his objection.

It is no answer to say, in effect, that the property is cheap enough anyway, and therefore the purchaser receives the worth of his money. That is begging the question; in effect, it is admitting all that is claimed, but seeking to excuse the denial of relief.

The purchaser may justly say: "I was deceived by the false representations of your agent; he misstated the facts; the appraisement was not at hand, so that even the clerk could not obtain it. There was no bid but mine, and that was procured by falsehood and misrepresentation." The

misrepresentation is admitted, and the court answers the purchaser, in effect: "You had no right to rely upon the representations of the commissioner appointed by the court to conduct the sale, and, although you were the sole bidder and there was an incumbrance of \$3,000 on the land of which you had no notice, and was in excess of the amount of your bid, yet the land is cheap enough and the court will not relieve you."

In regard to the objection that the purchaser could have examined the title for himself, the answer is that there was no time to make an investigation of the title. The sheriff had offered, and was then offering, the property for sale. There were no bidders. Norton came up and inquired in regard to the sale and the title that would be acquired. The officer professed to know, and informed the party that he would obtain a clear title. The bidder certainly could rely upon this statement. Had the officer said, "I have no knowledge in regard to the matter, you must examine the records for yourself," then the purchaser would have bid at his peril, and the doctrine of *caveat emptor* would have applied.

Considerable stress is laid upon the doctrine of *caveat emptor*, and it is said the purchaser must beware. The doctrine does not apply where a party has been induced to bid by a misstatement of facts made by the officer who conducted the sale; and I think not a single case can be found where a sale was made under a decree of a court of equity by an officer appointed by the court where such misrepresentations have not been held good cause for setting the sale aside.

The decision in this case practically overrules *Paulett v. Peabody*, 3 Neb., 196; and *Frasher v. Ingham*, 4 Neb., 531, and, I believe, does great injustice to the purchaser, and places the court in the attitude of approving deception in its officers in conducting sales under its direction.

Second—It is admitted, by not being denied, that "on

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the 15th day of September, 1889, he (Norton) met the sheriff, whereupon said sheriff stated to the affiant that the said amount bid by this affiant, to-wit, \$2,535, was not two-thirds of the appraised value; * * * that the land had been appraised at \$4,800, and could not be sold for less than \$3,200, and unless Norton would raise his bid to \$3,200, the sale would be declared off," etc. That is, that Norton's bid was not sufficient to authorize the sheriff to entertain it, and therefore, unless Norton would raise the bid to \$3,200, he would make a report of no sale. Norton informed him that he would not raise his bid, and the sheriff in effect declared it off.

It is probable that this was part of the scheme to defraud Norton, by putting him off his guard, and preventing an investigation of the title before the sale was confirmed, because the sheriff, without further notice to Norton, made a report of the sale and it was thereupon confirmed, without notice to Norton, and in his absence.

So far as the sheriff is concerned, his conduct is wholly indefensible, and can only be accounted for upon the theory of a scheme to defraud Norton, in which, probably, he was not alone. I do not care to comment on this feature of the case, as it presents the officer in a very unenviable light. As I understand the law, a court of equity, in making a sale of real estate under a decree of foreclosure, takes the place of the vender, and the person making the sale is the agent of the court, and it is the duty of the court to see that the sale was fairly conducted in all respects, and that it will not sanction misrepresentations in its agent as to the title of the property, or incumbrances, to induce persons to bid. In other words, misrepresentations which, if made by the land owner himself to a purchaser, would be good ground to set a sale aside, are equally so when made by the person appointed by the court to conduct a sale under a decree; and experience has shown that the establishment of this rule has induced competition in bidding

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at such sales. (*McGown v. Wilkins*, 1 Paige Ch. [N. Y.], 120; *Morris v. Mowatt*, 2 Id., 586; *Veeder v. Fonda*, 3 Id., 94; *Seaman v. Hicks*, 8 Id., 656; *Kauffman v. Walker*, 9 Md., 229; *Tooley v. Kane*, 1 S. & M. Ch. [Miss.], 518.)

Third—I do not understand that the rule of *caveat emptor* applies where another element intervenes, viz., false representations. It seems to me that great injustice is done to the plaintiff in error, and a rule is established that is liable to be fraught with gross injustice, not only to purchasers at judicial sales, but to the owners of the equity of redemption as well. In my view, the sale should be set aside.

SIMEON PHILLIPS V. ISAAC C. BISHOP ET AL., APPEL-
LEES, IMPLEADED WITH N. J. PAUL, APPELLANT.

[FILED OCTOBER 26, 1892.]

1. **Conveyance of Homestead: ACKNOWLEDGMENTS: CERTIFICATE OF NOTARY: IMPEACHMENT.** A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent.
2. **Evidence in this case considered, and held insufficient to overcome the officer's certificate and the evidence in favor of the execution and acknowledgment of the instrument.**

REHEARING of case reported in 31 Neb., 853.

Paul & Templin, and *O. A. Abbott*, for appellant.

Thompson Bros., and *T. T. Bell*, contra.

NORVAL, J.

This is a rehearing of the case reported in 31 Nebraska, at page 853. The action was brought in the court below

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by Simeon Phillips to foreclose a mortgage given by Isaac C. Bishop and Ida Bishop, his wife. To the action, N. J. Paul was made a defendant, who filed an answer and cross-petition, praying the foreclosure of a mortgage given by the Bishops, upon the same real estate described in plaintiff's petition, to one A. G. Kendall, and by him transferred to Paul.

To the cross-petition Isaac C. Bishop filed an answer, setting up that one tract of the real estate in controversy was a homestead of less value than \$2,000 over and above incumbrances thereon; that the mortgage given to Kendall was never acknowledged by his wife, and was therefore void. He also pleaded usury and payment.

The defendant Ida Bishop answered the cross petition, alleging that the mortgage included the homestead of herself and husband, and denies that she ever acknowledged the mortgage in question, or that she ever signed the same in the presence of the notary public who certified to the acknowledgment, or any other person, or that she ever received any consideration for so doing. To these answers a reply was filed by Paul.

Upon the trial the district court held that the mortgage described in Paul's cross-petition was void as to one of the pieces of property therein described, on the ground that the same was a homestead of a value not to exceed \$2,000, and that the wife did not acknowledge the execution of the mortgage. On the former hearing the decision of the trial court was affirmed by this court.

It is perfectly clear that, under the homestead law of this state, a mortgage on the homestead of a married person is void unless the same is executed and acknowledged by both husband and wife. This has been the uniform holding of this court, and a citation of the decisions is unnecessary. It is strenuously urged by appellees that Ida Bishop did not acknowledge the mortgage in controversy. If the proofs establish the proposition to that de-

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gree of certainty required to impeach the certificate of the officer certifying to the acknowledgment, then our former decision was right and must stand; otherwise not.

That the mortgage was executed and acknowledged by Isaac C. Bishop before W. L. Thompson, a notary public in and for Howard county, is undisputed. Mrs. Bishop admitted, when upon the witness stand, that she voluntarily signed the mortgage, but claims she did so at her home, and not before the officer. Mr. Thompson, the notary, certifies that she, as well as her husband, acknowledged the instrument before him in the manner provided by the statute. The certificate of the officer being in proper form, although not conclusive of the fact of acknowledgment, is strong and convincing evidence that the wife acknowledged the mortgage. The certificate, of course, can be impeached by proof of fraud or duress, but the evidence must be clear and satisfactory. As a general rule, the unsupported testimony of the party purporting to have made the acknowledgment is insufficient to overcome the officer's certificate. Where, as in this case, the execution of the instrument is admitted, in order to sustain such a defense, the proof must be clear and convincing. (*Insurance Co. v. Nelson*, 103 U. S., 544; *Russell v. Baptist Theo. Union*, 73 Ill., 337; *Marston v. Brittenham*, 76 Ill., 614; *Crane v. Crane*, 81 Ill., 165; *McPherson v. Sanborn*, 88 Id., 150; *Blackman v. Hawks*, 89 Id., 512; *Heeter v. Glasgow*, 79 Pa. St., 79; *Fitzgerald v. Fitzgerald*, 12 Reporter, 720; *Gabbey v. Forgeus*, 15 Pac. Rep. [Ks.], 866; *Bailey v. Landingham*, 53 Ia., 722; *Smith v. Allis*, 52 Wis., 337; *Johnson v. Van Velsor*, 43 Mich., 208.)

Applying the rule above stated to the case at bar, is the evidence sufficient to sustain the defense made by the answer? The evidence is very conflicting. In support of the officer's certificate there is in the record the direct and positive testimony of A. G. Kendall and C. H. Paul, that Mrs. Bishop did execute and acknowledge the mortgage in their

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presence in the St. Paul National Bank, before W. L. Thompson, a notary public. Mr. Kendall was at the time cashier of the bank, and Mr. Paul was an employe therein, and signed the mortgage as subscribing witness. The deposition of W. L. Thompson was taken, which, while sustaining his certificate of acknowledgment, was excluded as evidence.

Mr. and Mrs. Bishop each testified that the latter signed the mortgage at their home, about two miles from St. Paul; that she never acknowledged the instrument before the notary, and that she was not in St. Paul at the time the same purports to have been acknowledged, nor for a considerable length of time prior and subsequent to said date. Mr. Bishop further testified that after his wife signed the mortgage he took it to St. Paul, acknowledged it before Mr. Thompson, and delivered it to the mortgagee. Upon the trial both appellant and appellees proved other facts having some bearing upon the question. Appellees introduced witnesses tending to establish an *alibi*—that Mrs. Bishop was not in St. Paul at the time the mortgage purports to have been acknowledged, and appellant produced witnesses, equally as credible, although not so many, who testified that Mrs. Bishop was in the bank on said date. We think the evidence on the part of the appellees is entirely insufficient to overcome the formal certificate of acknowledgment, and the testimony of Mr. Kendall, and the subscribing witness, Mr. Paul, who, so far as the record discloses, are entirely disinterested witnesses. Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.

This court, in passing upon a similar question in *Perceau v. Frederick*, 17 Neb., 117, said: "It is contended on

behalf of the defendant, and we think correctly, that the certificate of the officer taking the acknowledgment must stand against a mere conflict of evidence, whether the instrument was voluntarily signed, acknowledged, and delivered or not, and cannot be impeached except upon proof which clearly shows it to be false and fraudulent."

In *Marston v. Brittenham*, 76 Ill., 611, *supra*, the court say: "To impeach such a certificate, the evidence should do more than produce a mere preponderance against its integrity in the balancing of probabilities—it should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent."

The supreme court of the United States, in *Young v. Duvall*, 109 U. S., 573, has held that the certificate must stand as against a mere conflict of evidence. We hold, from reason and authority, that the evidence is insufficient to sustain the defense.

We agree with the conclusion of the lower court that the mortgage was given to secure a usurious loan of money, and that after deducting the usurious interest agreed to be paid from the principal sum, there is due appellant from appellee, Isaac C. Bishop, the sum of \$4,223.71. The decree of the district court is reversed, and a decree of foreclosure entered in this court for said sum of \$4,223.71, with costs of the lower court against appellant, the costs in this court taxed to appellees.

DECREE ACCORDINGLY.

THE other judges concur.

JOHN L. WATSON V. WILLIAM COBURN ET AL.

[FILED OCTOBER 26, 1892.]

1. **Conversion: DEFENSES: MITIGATION OF DAMAGES.** When goods have been converted, and the owner afterwards receives the whole or a portion thereof back, or the proceeds arising from their sale, he does not thereby bar his right of action for the original wrongful taking, but such fact may be shown in mitigation of damages.
2. ——— : ——— : ———. In an action for conversion it is no defense to show that the property has been taken from the wrongdoer by a third party, by legal process or otherwise, unless the original owner has received it, or had the benefit of the proceeds thereof, where the same has been sold.
3. ———: **MEASURE OF DAMAGES.** In an action by a mortgagee for conversion against a sheriff who has levied on the property at the suit of a creditor of the mortgagor, the plaintiff is entitled to receive as damages the actual market value of the property at the time of the conversion, with interest from that date, less the market value of that portion of the property subsequently recovered or the proceeds of which plaintiff has had the benefit, and not exceeding the amount remaining unpaid on the mortgage.
4. **Weight of Evidence.** *Held*, That the verdict is against the evidence.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Ambrose & Duffie, for plaintiff in error.

B. G. Burbank, and *Gregory, Day & Day*, contra.

NORVAL, J.

The action below was brought by John L. Watson against the principal and sureties on the official bond of William Coburn, sheriff of Douglas county, for the conversion of a stock of furniture. There was a trial to a jury, who re-

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turned a verdict in favor of the plaintiff, assessing his damages at \$1,196.25. Each party filed a motion for a new trial; both motions were overruled, and judgment was thereupon entered upon the verdict of the jury. Each party prosecutes error to this court.

On and prior to February 28, 1888, the New York Storage & Loan Company, a corporation doing business in the city of Omaha, was the owner of the goods in controversy, and on said date it executed and delivered to Watson a chattel mortgage on said stock of goods, to secure the payment of a loan of money at the time made by Watson to the corporation, and for money previously borrowed. After the execution of the mortgage Watson took possession of the goods and managed the business until about the middle of April following, when George C. Wheeler and E. G. Cundy, the president and secretary, respectively, of the corporation, forcibly took possession of the stock and certain collaterals held by Watson to secure said loan, during Watson's absence from the store.

Thereupon Watson commenced an action in the district court of Douglas county against the New York Storage & Loan Company, Wheeler and Cundy, to restrain said Wheeler and Cundy from disposing of the collaterals and from their interfering with the stock of goods. A temporary injunction was granted by one of the judges of the district court on the 23d day of April. Wheeler and Cundy immediately left the country, taking with them the collateral securities.

On the morning of April 24, Watson again took possession of the store and stock of goods therein, and in the afternoon of the same day the defendant Coburn levied upon and took the goods under an execution in favor of one W. L. Hall, and against the New York Storage & Loan Company. Subsequently the sheriff levied a writ of attachment on the goods, issued in favor of Dell R. Edwards and against said company. The Hall execution was

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issued upon a judgment rendered by the county court without any summons being issued, upon the confession of Wheeler, as president of the New York Storage & Loan Company, who had no authority so to do.

It also appears that Wheeler carried on business in the various names of New York Storage & Loan Company, New York Music Company, New York Piano Company, New York Storage Company, G. C. Wheeler & G. C. Wheeler, Manager, and incurred a large indebtedness, which he was unable to pay.

Dell R. Edwards, after the levy of her attachment, commenced an action against the New York Storage & Loan Company and W. L. Hall to enjoin the collection of the Hall judgment, and to have the same declared fraudulent and void. Subsequently she commenced another suit against the New York Storage & Loan Company, the New York Music Company, the New York Piano Company, G. C. Wheeler, Manager, W. L. Hall, John L. Watson, and others, alleging that the Watson mortgage was fraudulent and void, and praying that the same be so declared by the court, and for an accounting by all the defendants, and also that a receiver be appointed to take possession of the property of the New York Storage & Loan Company and dispose of the same. These several suits were consolidated. The court appointed E. Zabriskie receiver, and the sheriff turned over to him, on order of the court, that portion of the goods which had not been taken from him by legal process. The receiver immediately proceeded, under the order of the court, to advertise and sell the stock, and on the 6th day of August, 1888, he sold the same for \$1,954.28, which sale was duly confirmed. After paying the expenses of sale, receiver's fees, other costs, and various items, not costs in the case, there remains in the hands of the clerk of the district court, of the proceeds of sale, a balance of \$162.19.

John L. Watson appeared in the consolidated action and

filed an answer therein, setting up his mortgage and that he was in possession of the goods therein described, under said mortgage, at the time the sheriff made his levies.

After the issues had been made up in said action the court referred the cause to A. S. Churchill, Esq., to take the testimony and report his findings of law and fact. The referee made his report, finding the judgment entered in favor of W. L. Hall to be fraudulent and void, that the levy of the execution issued on said judgment conferred upon said Hall, or those serving said writ, no right, title, or interest in the property seized thereunder; that Dell R. Edwards had no cause of action against the New York Storage & Loan Company upon which to predicate an attachment, and that the levy of the attachment in her favor should be set aside and held for naught.

It was further found that the instrument under which Watson claimed was a *bona fide* mortgage, made upon a good and sufficient consideration; that Watson, immediately after the delivery thereof, took possession of the goods under the mortgage, and was in actual possession at the time the property was seized under the execution and attachment proceedings; that said mortgage was a paramount and superior lien upon all the property for the sum of \$4,493.62, and that he was entitled to enforce it against all the property levied on under the writ of attachment and execution.

Upon motion of Watson the report of the referee was confirmed in July, 1889. Two days prior to the appointment of the receiver, Watson commenced this action against the sheriff and the sureties on his official bond to recover the value of the goods covered by the mortgage, which had been levied upon by the sheriff under the execution and writ of attachment. The sheriff and his bondsmen pleaded the proceedings in the receivership case in bar of this action.

The first question we will consider is as to the sufficiency

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of this defense. It is a rule sustained by judicial decisions in this country that where one's goods are converted by another, the owner may sue for their value, or recover the property, but he cannot pursue both remedies. It is equally well settled that the subsequent recovery or return of the property does not extinguish the owner's right of action against the wrong-doer for the conversion, but only goes in mitigation of damages. (*Gibbs v. Chase*, 10 Mass., 125; *Brady v. Whitney*, 24 Mich., 154; *Western Land & Cattle Co. v. Hall*, 33 Fed. Rep., 236.) Where goods that have been converted are returned to and accepted by the owner, the measure of damages is the market value at the time of the original wrongful taking, less the market value at the time the same are returned. (*Irish v. Cloyes*, 8 Vt., 30; *Lucas v. Trumbull*, 15 Gray [Mass.], 306.)

Testing the adjudication in the receiver case by these principles, Watson is not estopped from prosecuting his action for the conversion of the property. It is true Watson, in the case in which the receiver was appointed, in his answer and cross-petition filed therein, claimed a lien upon the property by virtue of his mortgage, and asked that the mortgage be foreclosed. The property had already been sold by the receiver appointed at the request of Edwards. Watson could not recover the property, so he sought to recover the money arising from the sale. The adjudication was in his favor. He is entitled to the \$162.19, the net proceeds of the sale of the goods, which had been turned over to the clerk of the court by the receiver. To that amount only his claim against the officer for the conversion was satisfied. Any other rule would not make him whole. Where property is converted, just compensation to the owner is the rule. We are unable to perceive how the receipt of the proceeds differs from a return of the property, or the proceeds thereof, to the owner. Such payment is proper to be given in evidence only in mitigation of damages. Prior to the appointment of the receiver,

Watson elected to treat the levies as a conversion of the property, by bringing this action to recover the value of the goods. In our view, the adjudication of his rights in the suit referred to does not preclude him from maintaining this action.

Complaint is made because the court refused to give the third instruction requested by the plaintiff, which is as follows:

“The defendant cannot escape liability for wrongfully levying on said property, by showing that the property or any part thereof was taken from him by third parties after he had possession of the same under his levy.

“Neither is it any defense in this action that the goods were taken out of his hands and placed in the hands of a receiver under an order of this court, unless it be further shown that the goods or their proceeds afterwards came to the hands of the plaintiff, so that he had the benefit thereof.

“You will therefore disregard all evidence tending to show that any of the goods have been taken from the hands of the sheriff by third parties, or that any of them were placed in the hands of a receiver, unless it is further shown that the plaintiff has, since that time, had the entire value of such goods; and as to such goods as he has received the entire value of, the defendants should be credited with that amount.”

It requires no argument or citation of authorities to show that in an action for conversion of personal property the defendant cannot defeat the action by showing that the property, or a part thereof, has been taken from him by third parties, by legal process or otherwise, unless the original owner has received the goods, or had the benefit of the proceeds thereof. If all or a portion of the goods converted are returned to the owner, or he receives the proceeds of the same, the wrong-doer may prove such facts, not as a complete defense, but in mitigation of damages.

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The fact that a portion of the goods covered by plaintiff's mortgage was replevied from the sheriff, and others were turned over to the receiver, would not alone be a defense to the suit, but would be so to the extent that it was shown that Watson has had, or could have, the benefit of such property. The request stated the correct rule, was applicable to the evidence, and should have been given.

The jury disregarded the instructions of the court on the measure of damages. By the sixth paragraph of the charge the court told the jury that the plaintiff was entitled to recover:

First—The value of the property that went into the hands of the receiver, as shown by his sale thereof.

Second—The depreciation in value of the property between the date of conversion and the time when it was sold by the receiver.

Third—The value of any goods taken by the sheriff which were not turned over to the receiver, except such as were taken from the sheriff by legal process under the conditions stated in the fifth instruction.

From the amount of these items the jury were directed to deduct the amount in the hands of the clerk in the receiver case, and compute interest on the balance at the rate of 7 per cent from the time the goods were taken from the possession of the plaintiff to the first day of the term, September 23, 1889.

It is undisputed that the receiver sold the goods turned over to him for \$1,950. Deducting from this \$162.19, the amount in the clerk's hands, we have \$1,787.81. Add \$177.27 as interest for one year and five months at 7 per cent, would make \$1,965.08, which is the lowest sum, under the evidence and instructions, the plaintiff was entitled to recover, and yet the jury assessed his damages at only \$1,196.25.

In several of the instructions the jury were told that the plaintiff was estopped from asserting that the value of the

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goods which went into the hands of the receiver was other or greater than the sum for which they were sold. This was prejudicial error. The amount the receiver obtained for the goods does not determine their value at the time of the conversion, nor was it a material inquiry what the goods brought. Plaintiff was only chargeable with that portion of their proceeds which he received or was entitled to the benefit of. To that extent alone has he received compensation. In an action by a mortgagee for conversion against a sheriff who has levied on the property, the plaintiff is entitled to recover the actual market value of the property at the time of the conversion, with interest from the time of the taking, less the market value of that portion of the property subsequently recovered, or the proceeds of which plaintiff has received, and not exceeding the amount remaining unpaid on the mortgage. This is the measure of damages.

It is unnecessary to consider the other assignments of error discussed in the brief of counsel, as the most of them are covered by what has already been said, and the others are not likely to arise on the next trial. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

IN RE THOMAS JONES.

[FILED OCTOBER 26, 1892.]

Criminal Law: COMMITMENT TO REFORM SCHOOL: JURISDICTION OF COURT TO VACATE ORDER AND RESENTENCE PRISONER. The petitioner, on pleading guilty to an information charging him with the crime of burglary, was sentenced to the state in-

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dustrial school, as under the age of eighteen years, and was committed under said judgment to said institution. Shortly thereafter, and during the same term, the court sentencing him vacated and set aside said judgment, on the ground of mistake as to petitioner's age, and sentenced him again on the same information and plea of guilty, to be imprisoned in the penitentiary for the term of four years. *Held*, That the court had no jurisdiction to vacate the original judgment, or to pronounce the second sentence, and that the last sentence was a nullity.

ORIGINAL application for writ of *habeas corpus*.

Walter A. Leese, for petitioner:

A sentence takes effect from the day it is pronounced (*In re Fuller*, 34 Neb., 581), and a subsequent sentence fixing a different term is a nullity. (*People v. Messervey*, 76 Mich., 223; *People v. Kelley*, 44 N. W. Rep. [Mich.], 615; *Ex parte Lange*, 18 Wall. [U. S.], 163; *Brown v. Rice*, 57 Me., 55; *In re Mason*, 8 Mich., 70; *Sennott v. Swan*, 16 N. E. Rep. [Mass.], 451; *People v. Liscomb*, 60 N. Y., 559; *People v. Jacobs*, 66 N. Y., 8.)

George H. Hastings, Attorney General, for the state.

NORVAL, J.

This is an application by the above named petitioner for a writ of *habeas corpus* against James P. Mallon, warden of the state penitentiary.

It appears that on the 18th day of April, 1890, the petitioner pleaded guilty in the Otoe county district court to an information charging him with the crime of burglary, and, on the same day, was sentenced to the state industrial school, at Kearney, as under the age of eighteen years. He was duly committed to said industrial school, in pursuance of said sentence, on the 28th day of April, 1890, where he was kept and confined until the 15th day of the following month.

On the 10th day of May, 1890, the district court of Otoe

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county, on motion of the county attorney supported by affidavit, and in the absence and without the knowledge or consent of the petitioner, vacated and set aside the said sentence on the ground that the petitioner, at the time of the commission of the offense, was over the age of eighteen years, and the sheriff of said county was ordered and directed to proceed to said industrial school, receipt for and receive said petitioner and have his body before said court on the 17th day of said month. Pursuant to said order and judgment the petitioner was brought from said industrial school into said court on the 17th day of May, 1890, when the court again sentenced him, on the same information and plea of guilty, to be imprisoned in the state penitentiary, at hard labor, Sundays and legal holidays excepted, for the term of four years. Under this last sentence the petitioner has been confined in the penitentiary since May 31, 1890. Both sentences were pronounced at the same term of court.

The question presented by the record before us is, Did the district court have the power or jurisdiction to vacate and set aside the first sentence, at the same term of court at which it was rendered, but after relator had suffered part of the punishment thereby imposed, and pronounce a second sentence in the same case? If the entry of the last judgment was a mere error, which would subject it to reversal by this court upon a petition in error, then the petitioner is not entitled to his discharge upon this proceeding, for it is firmly settled in this state that *habeas corpus* is not a proper proceeding to review a judgment in a criminal case.

By section 5, chapter 75, Compiled Statutes, authority is conferred upon a court of record of this state to commit any minor, under the age of eighteen years, to the state industrial school, who has been found guilty in such court of any crime except murder or manslaughter committed under the age of sixteen years. This court has decided that the question of the age of the accused is one of fact to be decided by the trial court, and its finding can be re-

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viewed only in appellate proceedings. The record discloses that the district court, by the judgment first entered, found that Thomas Jones was a minor of the age required by law for confinement in the industrial school. Although the petitioner was over the age of eighteen years, the first sentence was not for that reason void, it was merely erroneous. The sentence and the commitment thereunder to the industrial school being legal, did the court have jurisdiction to sentence the petitioner to the penitentiary after he had undergone a part of the punishment under the first judgment? The answer must be in the negative. While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it is rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment, even in a civil case, is at an end after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense. The fundamental law of the state as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act. (*In re Mason*, 8 Mich., 70; *Brown v. Rice*, 57 Me., 55; *State v. Cannon*, 5 Criminal L. Mag., 387; *People v. Whitson*, 74 Ill., 20; *Com. v. Weymouth*, 2 Allen [Mass.], 147; *People v. Liscomb*, 60 N. Y., 559; *People v. Jacobs*, 66 N. Y., 8; *Ex parte Lange*, 18 Wall: [U. S.], 163; *People v. Meservey*, 76 Mich., 223; *People v. Kelley*, 44 N. W. Rep. [Mich.], 615.)

The power of a court to revise, vacate, or modify a judgment in a criminal case, or substitute another for the original judgment is exceedingly doubtful in this state, since we

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have held that a sentence dates from the day it was pronounced, but as the first sentence in this case had actually gone into effect by commitment under it, the question does not necessarily arise on this record.

In re Mason, supra, the petitioner was convicted of larceny and sentenced to the state reform school of Michigan, as under sixteen years of age. At the time of his sentence he was in fact, of the age of twenty years. After he had been committed to the reform school, the court sentencing him ordered him brought back from that institution that his age might be inquired into and ascertained, for the purpose of determining whether he should not be sentenced to the penitentiary. In pursuance of said order the petitioner was removed from the reform school and committed to the jail of the county, to await the action of the court. On an application for his discharge by *habeas corpus*, the supreme court of that state say: "A prisoner having been sentenced and committed to the reform school, as under sixteen years of age, the court sentencing him cannot, on the ground of mistake as to the prisoner's age, proceed to give a new sentence. The sentence is not made void by such mistake."

In *Brown v. Rice, supra*, the prisoner had been legally convicted and sentenced to imprisonment in the county jail for six months. After serving nineteen days of his sentence, he was recalled into court and sentenced on the same indictment and conviction to be imprisoned in the state prison for the period of three years. It was held that the court had no power to recall him from jail and impose another sentence. The other authorities above cited are equally in point.

The first sentence being legal, we would remand the petitioner to the state industrial school, were it not for the fact that he is now over the age of twenty-one years, and his sentence has therefore expired. It follows that the petitioner must be discharged.

WRIT ALLOWED.

THE other judges concur.

ISAAC C. HANSCOM V. PETER BURMOOD.

[FILED OCTOBER 26, 1892.]

1. **Witnesses: IMPEACHMENT: PRELIMINARY STEPS.** When it is sought to impeach a witness by proving that he has made statements out of court, or upon a former trial, contradicting his testimony, the attention of the witness must be first called to the alleged statements, to the time and place of making them, and to whom made.
2. **Herd Law: TAKING UP TRESPASSING ANIMALS.** The person taking up stock for trespassing upon cultivated lands must comply substantially with the requirements of the herd law, particularly the giving of notice, unless the same are waived, or he will acquire no lien upon such stock.
3. ———: ———: **NOTICE TO OWNER.** The party taking up stock must give notice to the owner thereof within a reasonable time after the same is taken up.
4. **Replevin: VERDICT: ASSESSING VALUE OF PROPERTY.** In replevin, when the property has been delivered to the plaintiff, who is the general owner thereof, if the jury find in his favor, it is unnecessary for them to assess the value of the property.
5. ———: **JUDGMENT IN ALTERNATIVE: RETURN OF GOODS OR VALUE.** In such an action, where a verdict is returned in favor of the plaintiff, a judgment in the alternative for the return of the property, or, in case a return cannot be had, the value thereof, is improper, but the judgment will not be reversed on that ground where it appears that the property was in plaintiff's possession when the judgment was entered.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Thompson Bros., for plaintiff in error.

Thummel & Platt, contra.

NORVAL, J.

This was an action in replevin, brought by Peter Burmood to recover the possession of eight calves. The prop-

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erty was taken under the writ of replevin by the sheriff, and the possession thereof delivered to the defendant in error. On the trial the jury returned a verdict finding that the plaintiff at the commencement of the action was the owner and entitled to the possession of the calves; that they were of the value of \$75, and that the damages for the unlawful detention were \$2.50. A motion for a new trial was made by plaintiff in error, which was denied by the court, and judgment was rendered in accordance with the verdict.

The proofs show that at and prior to the commencement of the suit the parties resided on adjoining farms, and that defendant in error was the owner of the stock in question. The plaintiff in error introduced evidence tending to show that the calves were trespassing upon his cultivated lands. The evidence on the part of the defendant in error is to the effect that the calves escaped from his premises and went upon the highway, and were driven from the public road by plaintiff in error onto his farm, where they were placed in an enclosure; that as soon as the owner learned of their whereabouts he went to the residence of plaintiff in error for the purpose of bringing them home, and asked him to state the amount of damages they had committed, which he declined to do; that thereupon plaintiff in error in an angry and violent manner attacked defendant in error with a club, and drove him from his premises and refused to allow him to take away the calves. Subsequently this action was commenced.

The evidence was sufficient to authorize the jury in finding that the calves were not trespassing upon the premises of plaintiff in error, and that he wrongfully detained the same.

The main controversy in the court below was whether the calves, at the time they were taken up, were feeding in defendant's corn field. On the trial plaintiff called and examined as a witness one Eberhart Kurz, who testified

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that within a day or two after the stock had been taken up, at the request of Mr. Burmood, he made a thorough examination of Mr. Hanscom's premises and was unable to find any tracks in the field of corn where it was alleged the calves had been trespassing. Counsel for defendant then offered to prove by Mr. Hanscom that Eberhart Kurz had testified, on the trial of the cause in the justice court, that he was in the corn field and saw the calves' tracks there at the time he made the examination of the premises referred to in his testimony, which offer was objected to by the attorney for defendant in error, and the objection was sustained by the court. This ruling is now assigned for error. The excluded testimony was offered for the purpose of impeachment, and the proper foundation for its introduction had not been laid. The witness Kurz was not asked, when on the witness stand, whether he had testified upon the former trial that he saw the calves' tracks in the corn field. Where it is sought to impeach a witness by proving that he has made statements out of court, or upon a former trial, contradicting his testimony, the attention of the witness must be first called to the alleged statements, to the time and place of making them, and to whom made. (*Wood River Bank v. Kelley*, 29 Neb., 591.)

Objection is made to the third instruction given by the court on its own motion, which is as follows: "If you find from the evidence that the calves in controversy were on the 27th day of September, 1889, trespassing on the cultivated lands of the defendant, and damaged the defendant in any sum, the defendant has a right to impound said calves while so trespassing, and hold them until paid his damages, provided he gave the notice required by section 3 of the herd law, in a reasonable time after taking up said calves in the manner and according to the requirements of said section 3 of the herd law, and would be entitled to the possession of the said calves until paid his damages."

It is the duty of a person taking up stock trespassing

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upon cultivated lands, under the provisions of the herd law, to give written notice to the owner of such stock, if known, within a reasonable time after the same is taken up, stating therein the amount of damages claimed and naming the arbitrator by him selected for the purpose of assessing the damages sustained by the trespassing animal. The taker-up must comply substantially with the requirements of the statute, unless the same are waived, or he will acquire no lien upon such stock. Doubtless the written notice may be waived, as where a verbal one is given and the owner acts thereunder and appoints his arbitrator. But there was no waiver in this case. Plaintiff in error failed to choose an arbitrator and refused to state the amount of damages he claimed. The instruction complained of was not only correct as a legal proposition but was applicable to the facts proven.

Complaint is made of the form of the judgment. The jury found the value of the property and assessed damages to the plaintiff for the detention. The judgment is "that the plaintiff have and recover from the said defendant the return of the calves in controversy, or, if the same cannot be returned, then that the said plaintiff shall have and recover of and from said defendant the sum of \$75, and his damages aforesaid in the sum of \$2.50, and the costs of this action taxed at \$——." The verdict and judgment are both in form objectionable. Plaintiff is the general owner of the property, which was in his possession at the time of the trial and the rendition of the judgment, he having become possessed of this property by means of the order of replevin. Its value should not have been assessed by the verdict nor a judgment rendered for the same, but merely for the damages found by the jury for the unlawful detention. Had the verdict been in favor of the defendant, then a judgment in the alternative in his favor for a return of the property, or for its value, would have been proper. Notwithstanding the judgment is wrong in form, the de-

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fendant is not in any manner prejudiced thereby, for the reason the property was already in plaintiff's possession, so that the alternative part of the judgment was fully satisfied when rendered. There being no reversible error in the record, the judgment is

AFFIRMED.

THE other judges concur.

M. E. HERBERT, APPELLANT, V. SAMANTHA KECK ET AL., APPELLEES.

[FILED OCTOBER 26, 1892.]

Mechanics' Liens: FORECLOSURE: SUFFICIENCY OF EVIDENCE.
Evidence, in the bill of exceptions, examined, and *held* sufficient to sustain the finding and decree of the district court.

APPEAL from the district court for Buffalo county
Heard below before HAMER, J.

Marston & Nevius, for appellant.

Calkins & Pratt, contra.

POST, J.

This was an action by the plaintiff in the district court of Buffalo county to foreclose a mechanic's lien for a balance claimed to be due under a contract for furnishing a steam-heating apparatus for the building of the defendant Mrs. Keck, in the city of Kearney, known as the Midway hotel. The other defendants have liens thereon, which appear of record, and are for that reason made parties to the action. The written contract between plaintiff and the defendant Mrs. Keck, the execution of which is ad-

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mitted, provides for a complete system of steam heating and gas pipes to be furnished and put into said hotel by plaintiff for the sum of \$5,100. It is conceded by counsel for the defendant that if plaintiff had furnished and put in place all of the material, in the manner and within the time specified in the contract, there would be due thereon at the time this action was commenced the sum of \$1,668.69. It is contended, however, that plaintiff should not recover that amount for three reasons, which will be noticed in their order.

First—On account of material fixtures and appliances provided for by the contract, but not furnished, which render the plant less valuable as well as diminish the cost of construction. It is conceded by plaintiff that certain appliances required by the specifications were entirely omitted, viz., for returning the water formed by the condensing of steam to the boiler by force applied through a pump, whether above or below the level of the water in the boiler. The devices specified consisted of a catch basin, receiving tank, steam pump, and other accessories to what is known as the high pressure system, which do not call for a more definite description in this connection. The plaintiff undertook to excuse the omission of these articles on the ground that the contract after its execution was so modified as to provide for a low pressure instead of a high pressure system, as specified therein. The alleged modifications, he claims to have made with Mr. Frank, the superintendent of defendant, immediately after the signing of the contract at St. Joseph, Mo., and is positively denied by Mr. Frank. The latter is strongly corroborated by the fact that on the 23d day of February, 1887, which was after his bid was accepted and before the contract was signed, plaintiff wrote to Mr. Frank suggesting the substitution of the two boilers subsequently used for the one contemplated in the specifications. This he admits in his testimony was the only change ever suggested to, or made

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by, Mr. Frank. It cannot be said in view of the conflicting character of the evidence that the district court erred in finding for the defendant on that issue.

Second—Poor workmanship, which rendered the plant less valuable and delayed the use of the building. In support of this claim it is contended that there was a failure to brace and stay the masonry enclosing the boiler, as specified, in consequence of which it had to be rebuilt the first summer at an expense of \$160. There is no issue upon the failure in this respect, but plaintiff contends that the damage to the brick work was occasioned by the want of capacity of the chimney and in no way attributable to any neglect or failure on his part. There was also a claim for failure to provide dampers and to insulate the pipes where they passed through walls, ceilings, and floors, and negligence and unskillful workmanship in laying and setting the gas pipes, by which it became necessary to take up the floors and remove the plastering in parts of the building. Upon this question also the finding of the district court, if not in accordance with the clear preponderance of the proofs, is supported by evidence amply sufficient to sustain it in this court.

Third—Failure to complete the work by plaintiff within the time specified, to the defendant's damage. It is provided by the contract that the work shall be performed by the plaintiff in a "prompt and diligent manner, and that he shall do the several parts thereof at such times and in such order as the architect or superintendent may direct, and as soon as is consistent with good workmanship and the progress made upon the superstructure, and in default thereof shall pay to defendant \$25 per day for every day thereafter that said work shall remain unfinished, as liquidated damages." The defendant's agent, J. L. Keck, testifies that the building had been rented at the rate of \$440 per month and that the tenants were ready and waiting to take possession thereof. There is also evidence by the

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defendant tending to prove that the completion of the building was delayed by plaintiff from one to two months. The district court found for the defendant upon this issue also, and we are not at liberty to reverse the finding of that court. There was a general finding below for plaintiff in the sum of \$312, which does not appear from the evidence to be inequitable, and the judgment is

AFFIRMED.

THE other judges concur.

R. J. E. HAYS V. FRANKLIN COUNTY LUMBER COMPANY.

[FILED OCTOBER 26, 1892.]

Corporations: ACTION ON SUBSCRIPTION TO CAPITAL STOCK: SUFFICIENCY OF EVIDENCE. The evidence in the bill of exceptions examined and held to sustain the judgment of the district court.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

A. F. Moore, for plaintiff in error.

Sheppard & Black, contra.

POST, J.

Judgment was entered against the plaintiff in error in the district court of Franklin county in an action therein pending, and of which he now complains. The only ground assigned for a reversal of the judgment is that the findings of the referee are not supported by the evidence. We have read all of the evidence taken by the referee and

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can see no sufficient reason for reversing his finding. There are two causes of action presented by the pleadings. First—for a balance due on an agreement in writing to subscribe and pay for capital stock of the defendant in error to the amount of \$50. To this cause of action the defense was that the defendant in error, by its board of directors, had declared by resolution that all stock subscribed, but not paid for in full within a time named therein, including that of plaintiff in error, should be forfeited, and the names of such subscribers dropped from the list of stockholders. The resolution introduced in evidence is as follows: "Moved by Ewing that if the delinquent stockholders do not pay their full subscribed stock within the next thirty days their names shall be taken from the rolls." This is merely a resolution to declare the stock forfeited after the expiration of thirty days. There is no evidence that the action contemplated by the resolution was ever taken. The name of plaintiff in error was not dropped from the list of stockholders, nor was he excluded from a participation in the management of the company. It appears, too, that he subsequently purchased a bill of lumber from the company, and, on settlement therefor, was allowed a deduction of \$10, being the amount allowed as a credit on purchases by members holding the same amount of stock. We have no occasion to discuss the second cause of action, since the finding upon that was for the plaintiff in error. There being no error in the record, the judgment is

AFFIRMED.

THE other judges concur.

ROSENBAUM BROTHERS V. JAMES D. RUSSELL.

[FILED OCTOBER 26, 1892.]

1. **Pleading:** ANSWER DENYING MATERIAL ALLEGATIONS SUFFICIENT WHEN ASSAILED FOR THE FIRST TIME BY MOTION FOR NEW TRIAL. A denial in an answer of all material allegations in the petition, although faulty, will be held sufficient when assailed for the first time by motion for a new trial, particularly where it is treated at the trial as putting in issue the allegations of the petition.
2. **Review:** HARMLESS ERROR. A judgment will not be reversed on account of errors which could not have prejudiced the party complaining.
3. **Evidence** examined and *held* to sustain the judgment complained of.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Charles O. Whedon, for plaintiffs in error.

S. P. Davidson, *contra*.

POST, J.

For a statement of the facts in this case we refer to the opinion filed when it was before the court upon a petition in error by Russell, the present defendant in error. (*Russell v. Rosenbaum*, 24 Neb., 769.) After the case was remanded to the district court an amended answer was filed by the plaintiffs in error, in which they allege that the C., B. & Q. R. Co. has paid to them the full amount of the rebates claimed. Whereupon the railroad company was dismissed from the suit and the action prosecuted against them. A second trial resulted in a verdict for the plaintiff below under direction of the court, and judgment having been entered thereon, the case was removed to this

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court by petition in error. The first objection argued goes to the sufficiency of the reply, which is a denial of "every material allegation of the petition not already admitted," etc. This objection was made for the first time after verdict, the answer having been treated during the trial as putting in issue substantially all the allegations of the petition.

It is a rule repeatedly asserted by this court that pleadings will be most strongly construed against the objecting party, after trial and verdict on the merits. Had objection to the answer been made at the proper time it would undoubtedly have been sustained, but it is sufficient as against an objection made for the first time by a motion for a new trial. (Maxwell, Code Pleading, 386.)

Second—The second and third assignments may be considered together. They relate to the proof, over the objection of plaintiffs in error, of admissions by their attorney, Mr. Whedon, to the effect that the money due for rebates had been paid to them by the railroad company, and the admission in evidence of the original receipt therefor. It is plain that they could not have been prejudiced by the evidence complained of, since they had distinctly alleged the payment in their answer.

The fourth point made by counsel in his brief is that there is no evidence of an assignment of the claim in controversy by the firm of McClure & Griffin to the plaintiff below. This contention is not warranted by the record. McClure testifies, on his cross-examination, that the claim for rebates against the railroad company had been assigned to the plaintiff as collateral for money advanced to the firm of McClure & Griffin.

There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CHARLES B. BICKEL, APPELLEE, V. CATHERINE Mc-
ALEER ET AL., APPELLANTS,

AND

JOHN C. WATSON, APPELLEE, V. CATHERINE McALEER
ET AL., APPELLANTS.

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| 85 | 515 |
| 47 | 727 |
| 36 | 515 |
| 60 | 493 |

[FILED OCTOBER 26, 1892.]

Review: FINDINGS OF TRIAL COURT. In this court the presumption is in favor of the correctness of the finding of fact by the trial court, and such finding will not be reversed unless clearly wrong.

APPEAL from the district court for Otoe county. Heard below before FIELD, J.

Pound & Burr, for appellants.

Frank T. Ransom, and *John C. Watson*, *contra*.

POST, J.

The appellees commenced separate actions in the district court of Otoe county for the purpose of setting aside a conveyance by the defendants Miles and John McAleer, dated September 21, 1888, for the west half of section 22 and the northwest quarter of section 23, all in township 9, range 10, in Otoe county; also a conveyance by Miles McAleer to Thomas F. McAleer for the southeast quarter of section 23 in said township and range, dated August 22, 1888, on the ground that said conveyances were without consideration and made for the purpose of defrauding the creditors of the said Miles and John McAleer.

The answers of the several defendants put in issue all the material allegations of the petitions except the conveyances, which are admitted. The court below found that the southwest quarter of section 23 was the homestead of

Bickel v. McAleer.

the defendant Catherine McAleer, and had been occupied as such for many years by her and her husband, James McAleer, who held the title thereto at the time of his death in the month of September, 1888, and both petitions were accordingly dismissed as to that tract. The court further found that the conveyance of the southeast quarter of section 22 to Thomas F. McAleer was without consideration and in fraud of the rights of the creditors of Miles McAleer, the grantor thereof. There was a further finding that the defendants John and Miles McAleer, as heirs at law of James McAleer, deceased, each had an undivided seventh interest in the west half of section 22, subject to the dower interest of their mother, Catherine McAleer, and that the conveyance to the latter by said Miles and John was without consideration and in fraud of the rights of their creditors. The decree provided for the sale of the interests of said defendants, as found in the real estate above mentioned, to satisfy the judgments of the plaintiffs, from which the defendants appeal. It will serve no useful purpose to set out the evidence adduced on the hearing in the district court, or a statement of the facts proven. This is a typical case of its class and clearly within the rule so well settled in this court, viz., that all presumptions are in favor of the finding below, and the judgment of the trial court will not be disturbed unless clearly wrong. We have carefully read over the bill of exceptions and think there is evidence sufficient to sustain the finding, and the judgment of the district court is

AFFIRMED.

THE other judges concur.

THEODORE GALLIGHER V. WILLIAM J. CONNELL.

[FILED OCTOBER 26, 1892.]

1. **Forcible Entry and Detention: PRIOR POSSESSION.** Where a grantee of real estate, on receiving his deed, takes undisputed possession of the property conveyed, and in good faith continues in possession thereof, by himself, his agent or tenant, causing the premises to be fenced and cultivated, such facts constitute a prior possession which will entitle such grantee or his tenant to prosecute one by whom he is dispossessed for forcible entry and detention.
2. ——— : **EVIDENCE.** In a proceeding for forcible entry and detention the plaintiff may be permitted to prove payment of taxes by one under whom he claims, for the purpose of showing that the claim and possession of the latter is in good faith.
3. **Instructions set out in the opinion, held, properly given and refused.**
4. **Evidence examined, and held sufficient to sustain the judgment of the trial court.**

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Gregory, Day & Day, for plaintiff in error.

Connell & Ives, contra.

POST, J.

This was an action for forcible entry and detention of certain real estate in the city of Omaha, and comes into this court by petition in error from the district court of Douglas county. A former judgment in the same case was reversed in this court. (*Galligher v. Connell*, 23 Neb., 391.) The first ground for reversal assigned by counsel for plaintiff in error at this time is, that there is not sufficient evidence to sustain the verdict in favor of the defendant in error. It is said in the former opinion, page 403: "It is

claimed, however, that the rights of Mr. Connell date from the time of his alleged possession by cutting brush in the winter of 1884 and 1885, and by the plowing which he caused to be done in the spring of 1885. But such acts will not of themselves create a lawful possession. So far as the record discloses, the entry of Mr. Connell therein was unlawful and forcible, even if it is admitted he was acting under Peabody. There is no evidence that Peabody had any title to the half lot in controversy." On the second trial the defendant in error introduced a deed from Joel T. Griffin and Rollin C. Smith, the parties who subdivided and platted the addition in question, for the property in controversy to Wm. L. Peabody, dated February 25, 1869, together with the original plat thereof. He also testifies that Mr. Peabody took possession soon afterward under his deed and remained in possession until some time in 1880, when he left the state; that it was completely enclosed by Peabody, by a good, substantial wire fence and posts, the latter being about eight feet apart, some of which still remain standing; that he, Peabody, planted trees thereon, twenty or thirty of which are still standing; that about the year 1883, Peabody, by letter, requested him to take possession of the property and hold it for the former; that he enclosed it, with land of his own, by a barbed wire fence, which was removed by order of the city marshal, being prohibited by ordinance. On removing the barbed wire he rebuilt the fence with boards and cleared away the sumach bushes; that in the year of 1884 he arranged with a tenant to cultivate the land in controversy with his own in the same enclosure; that the latter was engaged in plowing when dispossessed by plaintiff in error Galligher, and that he had been in the continual, uninterrupted possession by himself or tenant from the year 1883, until the entry of Galligher. The evidence is therefore entirely different from that adduced on the former trial. Nor can the verdict be said to be against the weight of evidence in the sense that would

warrant this court in interfering. It tends to establish the claim that defendant in error and Peabody, under whom he claims, had had the uninterrupted possession of the property in dispute since the year 1869, or shortly thereafter, under a claim of title. This is such a lawful, prior possession as will support an action of forcible entry and detention. (*Campbell v. Coonradt*, 22 Kan., 704.)

Second—It is claimed that the district court erred in giving the following instruction at the request of the plaintiff below:

“While it is the law, as stated by the supreme court, and as you have been instructed by the third instruction given you on behalf of the defendant, that the mere cutting of a few brush or the attempt to plow the land in controversy would not of itself constitute possession, nor would the attempt to enter upon the prior, actual possession of defendant (if he ever had such possession) furnish any grounds for this action, you are instructed that it is also the law that if the plaintiff, under an arrangement with Mr. Peabody, entered into the peaceful possession of the ground in controversy in 1884, with the right to occupy and use the same, and you find such to be the fact from the evidence before you, and you also find from such evidence that at such time the said ground was open, vacant, and had been abandoned, and that after Mr. Connell obtained peaceable possession of said land he built and repaired fences so as to completely enclose the same, and if you find that brush was cut in 1884 by Mr. Connell, wires removed and the fence maintained until April, 1885, and that during said month, while the fence enclosed said land, he commenced plowing said land, and while the plow was in the furrow the defendant Gallagher entered upon said land, securing the plow and preventing, by threats of personal violence, the completion of said plowing by Rasmussen for Mr. Connell, such entry upon the part of Mr. Gallagher would be unlawful and forcible, and it would be your duty to so decide by your verdict.”

The particular objections to this part of the charge are, first, that it is argumentative; and, second, that it contains a number of independent clauses and that the jury must have understood it as a direction to return a verdict for plaintiff below if they found in his favor upon the proposition contained in either one of such clauses. As to the first objection it may be said that no force is added to an instruction by an exordium like that in the one above, yet we are unable to conceive how the plaintiff could have been prejudiced thereby. As to the second objection the instruction will not bear the construction given it by counsel for plaintiff in error. The alleged independent clauses are all connected by the word "and." The natural and reasonable construction thereof is, that if the jury found for the plaintiff below upon each of said propositions they should return a verdict in his favor.

Third—Exception is taken to the refusal of the following instruction asked by the defendant below:

"Sixth—It being made to appear without controversy that in March, 1882, the defendant Galligher, by himself and by his sub-lessee, Richard Colgan, entered into the actual possession and occupancy of the premises in question under and by virtue of a lease from one James E. North, who held title to the same by deed, and that said defendant Galligher, by himself and by his sub-lessee, Colgan, continued uninterrupted in actual, open possession of said premises up to the time of the commencement of this suit, you are directed to find for the defendant."

This instruction was properly refused. It assumes as undisputed the very question at issue, viz., the possession of the property in controversy. Defendant in error had testified to his possession since 1883, and is in part corroborated by Rasmussen, his tenant.

Fourth—Finally, exception is taken to the ruling of the court in permitting the plaintiff below to prove the payment of taxes on the property in controversy by Peabody

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on the ground that it tended to raise a false issue. The objection was not well taken. The evidence was admissible for the purpose of proving the *bona fides* of Peabody's possession and claim of title. There is no prejudicial error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

PRENTISS D. CHENEY V. GUSTAVE H. STRAUBE.

[FILED OCTOBER 26, 1892.]

1. **Covenant of Warranty: ACTION FOR DAMAGES FOR BREACH: ATTACHMENT.** The action of covenant was in form and substance *ex contractu*, and an action under the code by a covenantee for damage on account of the breach of a covenant of warranty, after eviction under a paramount title, is for a debt arising under a contract, which may be recovered by attachment.
2. ———: ———: **PETITION: FAILURE TO ATTACH WRITTEN INSTRUMENT.** An objection to a petition on the ground that an instrument on which the action is based, or a copy thereof, is not attached, should be made by motion before answer.
3. ———: ———: ———. In an action for the breach of a covenant of warranty by the covenantee after eviction under a paramount title, it is not necessary to set out the facts attending the eviction or particularly describe the adverse title. It is sufficient to allege in general terms an eviction under a title paramount to that of the covenantor.
4. ———: ———: **WHEN ACTION ACCRUES.** A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title.
5. ———: ———: ———. A cause of action accrues to a covenantee on his covenant of warranty, or for quiet enjoyment, upon eviction by the purchaser under a prior mortgage.

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| 48 | 130 |
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| 50 | 150 |
| 52 | 50 |
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| 56 | 630 |
| 57 | 334 |
| 35 | 521 |
| 58 | 611 |
| 35 | 521 |
| 62 | 184 |
| 62 | 195 |
| 62 | 302 |

6. ———: ———: **PROOF OF PARAMOUNT TITLE.** One who voluntarily surrenders to a third party asserting an adverse title, must, in an action against his covenantor for a breach of warranty, establish the validity of the title he has recognized.
7. ———: **BREACH: MEASURE OF DAMAGES.** The measure of damages for the breach of a covenant of warranty, or for quiet enjoyment, is the consideration paid for the land, with interest, and the costs and expenses incurred in the suit by which the covenantee is evicted; and if the latter is obliged to purchase an outstanding title in order to protect his own, he may recover the amount paid for such paramount title, not exceeding the consideration paid by him.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

L. C. Chapman, for plaintiff in error.

S. P. Davidson, and *J. Hall Hitchcock*, contra.

Post, J.

Judgment was rendered against the plaintiff in error in the district court of Johnson county in an action against him by the defendant in error on the covenants in a deed of conveyance executed by the former for certain lands in said county. The breach alleged, and for which a recovery was allowed by the district court, is that the plaintiff below was compelled to, and did surrender possession of the premises in question to a third party, the holder of a paramount title. The first error assigned is the overruling of a motion to discharge an attachment in the case. The ground assigned in the motion is that the defendant therein is a non-resident and that the action is not for the recovery of a debt or demand arising upon a contract, judgment, or decree. There is no error in the order complained of. A covenant is but a contract under seal (1 Rapalje and Lawrence Law Dic., 317), and the action of covenant was both in form and substance essentially *ex contractu*, and it requires no argument to prove that an action under the Code for the

breach of an undertaking in a deed to warrant and defend the title conveyed is for a debt arising upon a contract within the meaning of the statutes governing attachments. (See Wade on Attachment, secs. 12, 13.)

Second—Objection was made at the trial to the petition on the ground that it did not state a cause of action. The petition, after reciting the sale and conveyance by defendant below, is as follows: "That said deed contained provisions by which defendant covenanted with the plaintiff that he then held said land by good and perfect title, that he had good right and lawful authority to sell and convey the same, that said lands were clear and free from incumbrance, and that the defendant would warrant and defend the said premises and the title thereof against the lawful claims of all persons whomsoever; * * * that notwithstanding the delivery of the deed containing the said covenants as above mentioned, on the 29th day of March, 1890, plaintiff was compelled to surrender, and did surrender, said lands and the possession thereof to one Matthew Panko, the holder of the superior and paramount title thereto, which title of the said Panko was superior and paramount to that of said defendant and that conveyed by him to plaintiff," etc.

The first objection to the petition which we will notice is that the deed or copy thereof was not attached to the petition as provided by section 124 of the Code. This objection comes too late after answer. It should have been made by motion and not by demurrer to the petition. (*Ryan v. State Bank*, 10 Neb., 524.)

The second objection is that it does not appear from the allegations of the petition that the plaintiff below was evicted under a paramount title existing at the time of the conveyance of the land in question to him. The real contention on the part of the plaintiff in error is that it is necessary to set out the facts which it is claimed constitute an eviction. At common law, in an action of covenant

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for a breach of warranty, it was sufficient to allege in general terms an eviction under a paramount title (*Townsend v. Morris*, 6 Cow. [N. Y.], 123; *Rickert v. Snyder*, 9 Wend. [N. Y.], 416; *Day v. Chism*, 10 Wheat. [U. S.], 449; *Kellog v. Platt*, 33 N. J. Law, 328); and in a declaration on a covenant for quiet enjoyment it was sufficient to allege an entry by the grantor or his heirs without showing it to be lawful or setting out his title. (*Sedgwick v. Hollenback*, 7 Johns. [N. Y.], 376.) And under the Code it is sufficient to allege an eviction by the holder of a paramount title without pleading the facts. (Maxwell, Code Pleading, 648; Boone, Code Pleading, 245.)

Third—It is contended that the action is barred by the statute of limitations. So far as the covenant against incumbrance is concerned this position is sound. The mortgage in question was executed August 15, 1876, and the deed to defendant in error August 19, 1881. His cause of action on the covenant against incumbrance accrued, therefore, more than five years previous to the commencement of the action. (*Chapman v. Kimball*, 7 Neb., 399; *Davidson v. Cox*, 10 Id., 150; *Kern v. Klope*, 21 Id., 529.) But in addition to the covenants of seizin and against incumbrance the deed contained a general covenant of warranty in the following language: "And I covenant to warrant and defend the said premises against lawful claims of all persons whomsoever." This covenant is considered to be tantamount to that for quiet enjoyment and what will amount to a breach of the latter is also a breach of the former. (Devlin, Deeds, 932; *Real v. Hollister*, 20 Neb., 114.)

That a cause of action on a covenant for warranty or quiet enjoyment accrues to the covenantee upon his eviction by legal process under a prior mortgage, is well settled in this country. (*Stewart v. Drake*, 9 N. J. Law, 139; *Smith v. Dixon*, 27 O. St., 471; *White v. Whitney*, 3 Met. [Mass.], 81; *Tufts v. Adams*, 8 Pick. [Mass.], 547; *Sprague v. Baker*,

17 Mass., 585; *Furnas v. Durgin*, 119 Id., 500.) It is plain that the cause of action on the covenant of warranty did not accrue until defendant in error surrendered the premises to Panko, who purchased at sheriff's sale under the prior mortgage, and was therefore not barred by the statute of limitations.

Fourth—The next contention is, that there is no evidence that the mortgage in question was a valid lien upon the land. The mortgage was executed by ——— Ogden, a remote grantor, to one Steele, and foreclosed in the district court of Johnson county. Both parties hereto were made defendants in that action, and the plaintiff in error filed his separate answer, viz.: First, a general denial, and second payment in full. He also joined in the appeal to this court from the decree of foreclosure (*Allendorph v. Ogden*, 28 Neb., 201), where the decree of the district court was affirmed. The record of that case, which was introduced in evidence, conclusively establishes the validity of the mortgage, since that was the very question in issue in that suit.

Fifth—On the execution and delivery of the sheriff's deed to Panko, under the decree of foreclosure the latter demanded possession of the premises, whereupon defendant in error surrendered them to him. He was not required to wait until dispossessed by legal process, but had a right to surrender to the purchaser under the mortgage. At most, he assumed the burden of establishing the adverse title. (Devlin, Deeds, 925, 926; *Real v. Hollister*, *supra*.)

Sixth—Exception is taken to the instruction of the court upon the subject of the measure of damage as follows: "The court further instructs you as a matter of law, that the measure of damage in actions of this nature is the purchase price paid for the land in controversy, together with the interest on the same for five years last past, and for all improvements put upon the land by the

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plaintiff, the value of such improvements to be computed at the time of the eviction." The measure of damage for the breach of a covenant of warranty or for quiet enjoyment is the consideration paid for the land, with interest thereon, and the costs and expenses incurred by the covenantee in the suit to evict him. And if he is obliged to purchase an outstanding title in order to protect his own, his damage is the amount paid for such title, with interest, not exceeding the consideration paid by him. Such is the rule generally accepted in this country. The cases in point are too numerous to cite in this opinion, but will be found by reference to the notes to the following textbooks: 4 Kent's Com., 474, 478; Devlin, Deeds, sec. 934; Rawle, Covenants for Title, ch. 9; 2 Sutherland, Damages, 280, 291.

The giving of the instructions set out was error for which the judgment of the district court must be reversed and a new trial allowed.

REVERSED AND REMANDED.

THE other judges concur.

ANNIE B. HUGHES, EXECUTRIX, v. WILLIAM COBURN, SHERIFF.

[FILED OCTOBER 26, 1892.]

Sale: CHATTEL MORTGAGE BY PURCHASER IN POSSESSION. The C. B. Co., doing business in Chicago, Ill., ordered stoves from the C. C. S. Co. at Quincy, Ill., which, by direction of the former, were consigned to it at Omaha in care of a designated warehouse. B., the president of the C. B. Co., who was doing business in Omaha under the name of the O. T. H. F. Co., unloaded said stoves and stored them in the warehouse named, in space rented by him in the name of the O. T. H. F. Co. During the suc-

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ceeding thirty days B. exercised frequent acts of ownership over them, including the sale of a number thereof. At the expiration of the time named, B. mortgaged them to secure a debt due to the C. B. Co., giving possession under the mortgage. They were subsequently taken under an attachment against the C. B. Co. *Held*, The inference from the facts stated is that the C. B. Co. intended to part with the title and possession of said property in favor of C. B., and that the mortgagee of the latter is entitled to possession as against a subsequent attaching creditor in a suit against the C. B. Co.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Cornish & Robertson, for plaintiff in error.

A. C. Wakeley, *contra*.

POST, J.

This was an action of replevin for one hundred and fifty stoves by William Hughes against the defendant, sheriff of Douglas county. Hughes died and the action was revived in the name of plaintiff in error as his executrix. Plaintiff claims the property by virtue of a chattel mortgage to William Hughes by one Charles Baldwin. The defendant claims by virtue of an attachment in favor of the Comstock Castle Stove Company and against the Charles Baldwin Company, an Illinois corporation. On the 16th day of February, 1888, the Comstock Castle Stove Company sold to the Charles Baldwin Company a bill of stoves amounting to \$900. By direction of the last named company, said stoves were shipped to Omaha in care of Bushman's warehouse and consigned to the Charles Baldwin Company. On their arrival in Omaha, said stoves were taken from the cars by the employes of said Baldwin, who was doing business in that city under the name of the On Time Household Fair Company, and stored in space rented by him in the warehouse aforesaid. Subsequently fourteen of them were removed by Baldwin,

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or his employes, to the place of business of the On Time Household Fair Company and there sold and disposed of. The Charles Baldwin Company soon after failed, owing to numerous creditors, including the bill to the Comstock Castle Stove Company, for the stoves in dispute. On the 13th day of March, 1888, William Hughes commenced an action in Douglas county against the Charles Baldwin Company for goods sold and delivered, and caused the property of Baldwin, known as the On Time Household Fair Company, to be attached. Two days later Baldwin, to secure a settlement of the last named suit and to obtain possession of the property in the hands of the sheriff, offered to give his personal note for the sum due Hughes, secured by chattel mortgage upon the stoves in controversy. This proposition was accepted by Hughes, who receipted the bill against the Charles Baldwin Company, and paid the costs in the attachment suit, amounting to \$16.55, and Baldwin immediately executed to Hughes his note for \$399.92 and a mortgage on said stoves, which were turned over to the attorneys for Hughes, Bartlett & Cornish. The next day the stoves were taken by the defendant as sheriff to satisfy an attachment in an action by the Comstock Castle Stove Company against the Charles Baldwin Company. There was no further evidence introduced by either party with reference to the transaction between the Charles Baldwin Company and Charles Baldwin, the individual.

The question in whom was the title to the property, at the time it was mortgaged to Hughes, must depend therefore upon the inference to be drawn from the foregoing facts. Although there is evidence tending to prove fraud on the part of the Charles Baldwin Company, as well as Baldwin the individual, it should be remembered that fraud is not the ground upon which the defendant claims. By suing for the agreed price of the goods sold, the Comstock Castle Stove Company ratified the sale, and must now rely upon the title of the Charles Baldwin Company at the time of its

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attachment against the latter. The stoves were shipped to Omaha by direction of the Charles Baldwin Company, given at the time they were purchased, were unloaded by Charles Baldwin, and stored by him in space belonging to him in Bushman's warehouse. He, Baldwin, had for nearly thirty days exercised repeated acts of ownership over them, and had sold and removed fourteen of the number. The only natural and reasonable inference from these facts is that the intention of the Charles Baldwin Company was to invest the said Charles Baldwin or the On Time Household Fair Company with both the title and possession of the property. Whether the title of the latter could be impeached for fraud is a question not presented by the record in this case, since the only question presented or discussed is that of the legal title. There is another significant feature of the case, viz., that the mortgage under which plaintiff claims, was executed to secure an indebtedness due from the Charles Baldwin Company to William Hughes, hence any equitable considerations in favor of the claim represented by the defendant are equally applicable to that of the plaintiff. It is not necessary to examine the authorities cited by counsel. As has already been intimated, both the title and possession of the property in controversy were in Baldwin, plaintiff's mortgagor, at the time it was mortgaged by the latter, and the mortgagee, William Hughes, acquired a title thereby which should prevail as against one who subsequently attached in an action against the Charles Baldwin Company. The judgment of the district court is

REVERSED.

THE other judges concur.

HENRY WILSON V. WILLIAM COBURN, ASSIGNEE.

[FILED OCTOBER 26, 1892.]

1. **Constitutional Law: COUNTY COURT: EQUITY JURISDICTION.** The constitution does not prohibit the conferring upon the county court of equity jurisdiction except as to the subjects enumerated in section 16, article 6, viz., actions in which the title to real estate is sought to be recovered or may be drawn in question, actions on mortgages and for the conveyance of real estate.
2. **Assignment for Benefit of Creditors: FUNDS IN HANDS OF ASSIGNEE: JURISDICTION OF COUNTY COURT.** The funds of an insolvent debtor which come into the hands of the assignee are within the jurisdiction of the county court, and that court will proceed to determine the rights of the creditors thereto, and, subject to the limitations of the constitution, will grant the proper relief even to the extent of recognizing and enforcing a trust. The jurisdiction of a court of equity in such cases is concurrent only.
3. **———: INSOLVENT BANK: FRAUD IN RECEIVING DEPOSIT: PREFERENCE: MINGLED FUNDS.** The fact that a bank is insolvent within the knowledge of its officers, and receives the money of a depositor under circumstances which amount to a fraud upon him, is not of itself sufficient to entitle the latter to preference from the funds of the bank in the hands of an assignee. He may follow his money while he can trace and distinguish it or the proceeds thereof, but not after it has passed into the hands of the assignee, mingled with the other funds of the bank.
4. **Pleading.** PETITION examined, and *held* not to state a cause of action.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Ambrose & Duffie, for plaintiff in error:

On the facts stated in the petition plaintiff had a right to rescind the contract and reclaim the deposit as between himself and the bank. Where there is fraud, title to the

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| 42 | 908 |
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| 45 | 433 |
| 35 | 530 |
| 42 | 788 |
| 51 | 854 |
| 53 | 65 |
| 54 | 730 |

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deposit does not pass to the bank. (*Knowles v. Lord*, 4 Whart. [Pa.], 500; *King v. Fitch*, 1 Keys [N. Y.], 444; *Nichols v. Michael*, 23 N. Y., 264.) Assignee is not a *bona fide* purchaser. (*Donaldson v. Farwell*, 3 Otto [U. S.], 631; *Housel v. Cremer*, 13 Neb., 300.) Claimant must seek his remedy in county court and no other court has right to interfere. (*Hanchett v. Waterbury*, 115 Ill., 220.)

Bartlett, Crane & Baldrige, contra.

Post, J.

The plaintiff filed with the county judge of Douglas county a claim against the Bank of Omaha, which had previously made an assignment for the benefit of its creditors, to the defendant in error, sheriff of said county. From the claim or petition aforesaid it appears that there is due to plaintiff in error the sum of \$107.53 and interest, being a balance deposited in said bank prior to the assignment thereof. It is further alleged that said bank was insolvent at the time it received the deposit aforesaid, within the knowledge of all of its officers, and that the latter received said money with the intention of cheating and defrauding the plaintiff in error. He asks to be declared by the court to be a preferred creditor, and for an order for payment in full out of any funds in the hands of the defendant in error as assignee of said bank. To this petition a demurrer was interposed and sustained in the county court, on the ground that the court had no jurisdiction of the subject of the action, and because the facts stated did not constitute a cause of action. On petition in error to the district court the judgment of the county court was affirmed and the case removed to this court by petition in error.

It is urged as an objection to the proceeding that the petition is, in effect, a bill in equity for the purpose of

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having declared a trust in favor of the plaintiff in error. That the granting of the relief sought involves the exercise of equitable jurisdiction by the county court must, we think, be conceded. It is, however, an entire misconception of the powers of that court under the constitution to hold that it possesses none of the attributes of a court of equity. There are many subjects over which the county court, as a court of probate, has jurisdiction, which, under the old practice, were cognizable exclusively by the chancery courts. A familiar illustration is the jurisdiction formerly exercised by courts of equity over the accounts of executors and administrators and to enforce the claims of legatees and next of kin. And in some of the states probate courts and courts of equity still exercise concurrent jurisdiction of all matters pertaining to the estates of deceased persons. (*Frey v. Demarest*, 16 N. J. Eq., 236; *Hawes*, Jurisdiction, 73.)

In *Brown on Jurisdiction*, 130, it is said: "The jurisdiction of a probate court should, and ordinarily does, extend to all matters necessarily involved in the disposition of the estate. It may be remarked that the jurisdiction of the probate court partakes largely of the chancery powers. When the statute is silent it is sometimes necessary to look to the principles and practices in that court for a guide." The precise question involved is not whether the county court has power to allow a preference in any case in which a court of equity would grant relief, but whether it may determine the rights of contesting creditors of an insolvent with respect to funds which have come into the hands of the assignee, and thus directly within its jurisdiction. Our statute on the subject is entitled "An act regulating voluntary assignments for the benefit of creditors, practice thereunder, and to prevent the fraudulent violation of the same." By its provisions, original jurisdiction appears to have been conferred upon the county court in all matters pertaining to the distribution of property assigned, with

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the one exception found in section 20, viz., that the sale of real estate by the assignee shall be confirmed by the district court. It is clear that, upon delivery to the assignee of the personal property of the insolvent bank, the county court acquired jurisdiction over it, and will proceed to determine the rights thereto of all claimants, within constitutional limitations upon its power. The power vested in the county court by the assignment law over the estate of an insolvent upon a general assignment is practically the same as that possessed by it, as a court of probate, over the property of deceased persons. The jurisdiction in either case may involve the exercise of equitable power, and unless it is within some of the constitutional limitations must be sustained. By section 16, article 6 of the constitution, the jurisdiction of the county court is defined as follows:

“County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months’ imprisonment or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars.”

It will be observed that the constitution does not prohibit the conferring upon the county court of equity powers and jurisdiction, except in actions in which the title to real estate may be called in question, and foreclosure of mortgages. In *Brook v. Chappell*, 34 Wis., 405, the residuary legatee named in a will had promised the testator to pay specific sums as legacies to certain persons

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whereby the testator was induced not to change his will. On application to have the request and promise admitted to probate as a nuncupative codicil, while the application was denied on statutory grounds, it was held, under statutory and constitutional provisions practically the same as ours, that the county court as a court of probate had power to enforce a trust in favor of the proponents, and that the jurisdiction of courts of equity in such cases is merely concurrent.

The case of *Hanchett v. Waterbury*, 115 Ill., 220, called for a construction of the assignment law of that state, which does not differ materially from ours. It was held, that by the law governing voluntary assignments a new and special jurisdiction was conferred upon the county court, and that the jurisdiction of that court was exclusive. Judge Mulkey, in the opinion of the majority of the court, says: "The assignee, the insolvent debtor, and all persons claiming the fund, are subject alike to the summary jurisdiction of the court, and whatever rights, real or supposed, with respect to the fund, must be litigated therein."

While under section 32 of our assignment law a court of equity would undoubtedly have jurisdiction in a case like this, it is plain to us that such jurisdiction is concurrent only. Nor do we hold that the county court under the constitution is or could be vested with general equity powers. What we hold, and what seems to us clear, upon principle is, that the county court in the exercise of its powers with respect to the personal estate of an insolvent, in the hands of an assignee, may allow whatever relief the parties are entitled to with respect to such property, whether it would, under the former practice, have been denominated legal or equitable.

Second—Under the allegations of the petition, is the claimant entitled to preference over other creditors of the insolvent bank, or, in other words, does the petition state a cause of action? We think not. The rule on the sub-

ject is stated by Judge Story thus: "The right to follow the trust fund ceases only when means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." (Story's Equity, 1259.) That the foregoing rule is applicable to cases like this, where the funds in controversy are the assets of an insolvent bank, is well settled.

In *Ill. Trust and Savings Bank v. Smith*, 21 Blatch. [U. S.], 275, Judge Wallace, after remarking that the property comes into the hands of the receiver as a trust fund for the benefit of all of the creditors, proceeds as follows: "It would be a violation of law upon his part to set aside any part of these assets for the complainant unless his portion is capable of identification or being definitely traced and distinguished," etc., etc.

Counsel for plaintiff in error rely with confidence upon the case of *Cragie v. Hadley*, 99 N. Y., 131. We do not, however, regard that case as authority. That was an action against the defendants for the proceeds of a draft received for collection from an insolvent bank. The fund, therefore, was easily distinguishable from the other assets of the bank. It is evident from subsequent cases in New York that that case has never been regarded as an authority in cases like this, where the money of the claimant has been mingled with the other funds of the bank, and cannot be distinguished from other assets in the hands of the assignee or receiver.

In re N. River Bank, 14 N. Y. Sup., 261, is a case directly in point. The supreme court therein, after showing that *Cragie v. Hadley* was not authority, for the reason given above, hold that the petitioner was not entitled to preference, although he deposited his money on the forenoon of the day on which the bank closed its doors, on the assurance that it was solvent, upon the ground that it did not appear that the money had not gone into the gen-

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eral funds of the bank and because he had failed to impress upon the funds in the hands of the receiver the character of a trust.

In *Atkinson v. Rochester Printing Co.*, 114 N. Y., 168, the same distinction is made, and the court say: "The fact that the defendant became a creditor of the insolvent bank through the fraud of its officers, and the bank a trustee *ex maleficio*, gave the defendant no right to a preference over other creditors unless it could trace and recover its property." And such is the law as recognized from the earliest history by the courts of chancery. (*Ryall v. Rolle*, 1 Atkyns [Eng], 172; *Thompson's Appeal*, 22 Pa. St., 16; Perry, Trusts, sec. 128.) The judgment of the district court is

AFFIRMED.

THE other judges concur.

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| 35 | 536 |
| 44 | 153 |
| 35 | 536 |
| 46 | 886 |
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| 51 | 735 |
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| 35 | 536 |
| 459 | 601 |

JOHN W. MCCLELLAND ET AL. V. LEONARD K.
SCROGGIN.

[FILED OCTOBER 26, 1892.]

1. **Contract: CONDITIONAL SALE: BAILMENT.** By a written agreement S. leased to M. 640 acres of land and a large amount of personal property thereon, consisting of live stock and farming implements, of the agreed value of \$23,331. It was provided in said agreement: "That when said M. shall pay to said S. the sum of \$23,331, with interest thereon at the rate of ten per cent per annum, together with the rents above specified, and all sums which S. may advance to or for said M., with interest thereon, then all the above property shall be conveyed to him, the said M., together with all increase thereof. Until such payment such property shall be and remain the property of S. together with the increase thereof, and should any of said property be sold by consent of S., the proceeds thereof shall be ap-

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plied upon the above indebtedness." *Held*, Not a conditional sale, but an agreement to sell at the election of M., and that the relation of the parties with respect to said property is that of bailor and bailee only.

2. **Bailment: EXECUTION AGAINST BAILEE.** *Held*, That the property mentioned in said agreement, before payment by M. could not be taken on execution to satisfy judgments against the latter.

3. **Evidence examined, and held to sustain the decree for defendant in error.**

ERROR to the district court for Nuckolls county. Tried below before Morris, J.

H. W. Short and *S. B. Pound*, for John W. McClelland, plaintiff in error, contending that the contract was a sale and not a bailment of chattels, cited: *Mallory v. Willis*, 4 N. Y., 85; *Foster v. Pettibone*, 7 Id., 435; *Chase v. Washburn*, 1 O. St., 244; *Louergan v. Stewart*, 55 Ill., 44; *Richardson v. Olmstead*, 74 Id., 213; *Bailey v. Bensley*, 87 Id., 556; *Grier v. Stout*, 2 Ill. App., 602; *Johnston v. Browne*, 37 Ia., 200; *Nelson v. Brown*, 44 Id., 455; *Irons v. Kentner*, 51 Id., 88; *Carlisle v. Wallace*, 12 Ind., 252; *Rahilly v. Wilson*, 3 Dill. [U. S.], 420; *Williamson v. Berry*, 8 How. [U. S.], 544; 1 Story, Bailment, 2; *Baker v. Woodruff*, 2 Barb. [N. Y.], 520; *Norton v. Woodruff*, 2 N. Y., 153; *Tilt v. Silverthorne*, 11 Upper Can. Q. B., 619; *Wilson v. Cooper*, 10 Ia., 556; *Ives v. Hartley*, 51 Ill., 520; *Butterfield v. Lathrop*, 71 Pa. St., 226; *Marsh v. Titus*, 3 Hun [N. Y.], 550; *McCabe v. McKinstry*, 5 Dill. [U. S.], 509; *Grier v. Stout*, 2 Bradw. [Ill.], 602; *Benedict v. Ker*, 29 Upper Can. C. P., 410; *Jones v. Kemp*, 49 Mich., 9; *Austin v. Seligman*, 21 Blatchf. [U. S.], 506; *Fishback v. Van Dusen*, 33 Minn., 111.

R. D. Sutherland, for Thomas L. McClelland, plaintiff in error.

S. W. Christy, for Glazier Bros. et al., plaintiffs in error.

Robert Ryan, S. A. Searle, and T. T. Beach, contra:

Under the contract the relation of parties with respect to the chattels was that of bailor and bailee. (*Nelson v. Brown*, 53 Ia., 555; *Sexton v. Graham*, Id., 181; *Schindler v. Westover*, 99 Ind., 395; *Foreman v. Drake*, 98 N. C., 311; *Dunlap v. Gleason*, 16 Mich., 158; *Barker v. Roberts*, 8 Greenl. [Me.], 101; *Fawcett v. Osborn*, 32 Ill., 411; *Andrus v. Mann*, 92 Id., 40; *McCall v. Powell*, 64 Ala., 254; *Pash v. Weston*, 52 Ia., 675; *Whitney v. McConnell*, 29 Mich., 12; *Clark v. Jack*, 7 Watts [Pa.], 375; *Becker v. Smith*, 59 Pa. St., 469; *Middleton v. Stone*, 111 Id., 589; *Dando v. Foulds*, 105 Id., 74; *Edwards' Appeal*, Id., 103; *Colton v. Wise*, 7 Ill. App., 395; *Hunt v. Wyman*, 100 Mass., 198; *Weir Plow Co. v. Porter*, 82 Mo., 23; *Holt v. Holt*, 58 N. H., 276; *Evansville & T. H. R. Co. v. Erwin*, 84 Ind., 457; *Sargent v. Gile*, 8 N. H., 325; *Marquette Mfg. Co. v. Jeffery*, 49 Mich., 283; *Emerson v. Fisk*, 6 Greenl. [Me.], 200.)

Post, J.

This case comes into this court by petition in error from the district court of Nuckolls county. On the 20th day of October, 1888, the defendant in error, Leonard K. Scroggin, filed in said court his petition in which he alleges in substance that he is the owner of certain live stock and farm implements then in the possession of the plaintiff in error McClelland upon land owned by him, Scroggin, in said county. He alleges that the defendant below, McClelland, with intent to defraud him, had confessed judgments in favor of the other defendants therein named, amounting in the aggregate to \$10,068.80, and had procured the personal property aforesaid to be taken on execution to satisfy said judgments. In said petition it is alleged that the only right, title, or interest of the said McClelland in or to said property is such as is conferred by the following agreement, to-wit:

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"This contract and agreement, made and entered into this twenty-first day of February, A. D. 1888, by and between Leonard K. Scroggin, of Mt. Pulaski, Logan county, state of Illinois, of the first part, and John W. McClelland, of Oak, Nuckolls county, Nebraska, party of the second part, witnesseth:

"That said first party hereby leases to second party for the term of two years from the first day of March, A. D. 1888, to-wit: One section of land containing six hundred and forty acres, situated in Nuckolls county, Nebraska, upon the Little Blue river, now occupied by said second party.

"Said McClelland is to farm three hundred and twenty acres of said farm in a good farmer-like manner in corn and small grain, and therefor is to pay said Scroggin one-third of the corn in the crib clean and well gathered, one-third of the small grain delivered in the market designated by said Scroggin. For the pasture land of three hundred and twenty acres said second party is to pay to said Scroggin the sum of three hundred and twenty dollars yearly, on the first day of each March, on and after March 1, eighteen hundred and eighty-nine, for and during the continuance of this lease, being six hundred and forty dollars in all. Said Scroggin further agrees to lease to said McClelland the following property to be used upon said farm, to-wit: Two hundred and six cows, one hundred and twenty-six calves, coming one year old, forty-nine horses and colts, six bulls, forty hogs, and all the implements and machinery on said farm; and it is further agreed, that when said McClelland shall pay to the said Scroggin the sum of twenty-three thousand three hundred and thirty-one dollars (\$23,331), with interest thereon at the rate of ten per cent per annum, together with the said rents above specified, and all sums of money which said Scroggin may advance to or for said second party, with the interest thereon, then all the above described property shall be con-

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veyed to said second party by said Scroggin, together with all the increase thereof; until such payment, said property shall be and remain the property of said Scroggin, together with the increase thereof; and should any of said property be sold by consent of said Scroggin the proceeds therefor shall be applied in payment upon said above indebtedness. All property that may be purchased by said second party to be kept and used upon said farm shall be and remain the property of said Scroggin until said above mentioned debts shall be fully satisfied and paid, and thereafter the same or the remainder thereof unsold shall be conveyed to said second party by first party. It is further agreed by and between the said parties that in case the rents above mentioned and the above described debts shall be paid at the expiration of this lease the said second party is to have the privilege at his election to renew and extend this lease, at the same rental, for the period of two years from the expiration thereof. It is further agreed by and between said parties that said second party is to feed and take care of above mentioned stock in a good and farmer-like manner during the term of this lease.

"In witness whereof said parties have hereunto subscribed their names this twenty-first day of February, A. D. 1888.

L. K. SCROGGIN.

"J. W. McCLELLAND."

It is further alleged that since the defendant went into possession of the real estate and personal property above named, the plaintiff Scroggin has advanced to him large sums of money, and that he, defendant, has sold live stock and other property raised on said premises but has failed to account for the proceeds or any part thereof, wherefore he prays for an accounting, etc.

The answer of McClelland, after denying *seriatim* the several allegations of the petition as to fraud and collusion, non-performance of his undertakings, etc., alleges that on the 10th day of February, 1883, a written contract was en-

tered into between the parties substantially the same as the one set out in the petition. The consideration named in the contract set out by defendant is \$8,762.30, and the personal property described as being on the farm consists of thirteen horses, eighty-seven head of cattle, forty hogs, one stallion, twenty-seven head of sheep, four wagons, three cultivators, three breaking plows, one harrow, one sulky plow, one set of harness and one corn planter; said instrument to take effect and be in force from the first day of March, 1883. It is further alleged that he, McClelland, took possession under said agreement and managed said property until February 21, 1888, at which time he entered into the agreement with the plaintiff set out in the petition; that at the last named date he had fully paid the amount named in the first agreement, by his check on the bank of Scroggin & Son for \$5,000, and cash paid on said day \$4,271.35, and that he thereby became the owner of said property and the increase thereof, together with other property purchased by him and kept and used on the farm aforesaid, and that he had fully performed all the conditions of the agreement bearing date of February 10, 1883. It is also alleged that prior to the twenty-first day of February, 1888, the plaintiff had received from the defendant at five different times, money amounting in the aggregate to \$19,938.44, which with interest it was understood should be applied on the \$23,331 mentioned in the agreement executed on that day.

For a second defense it was alleged that defendant below had paid taxes on the plaintiff's real estate amounting to \$1,092.18 and on his personal property amounting to \$748.15; that he had made valuable and lasting improvements of plaintiff's land of the value of \$1,000, and performed services for him in making loans and collecting money, \$2,400; in digging wells, building fences and windmills, etc., \$3,498; and in managing the farm and feeding and caring for plaintiff's stock, \$1,500. He further alleges

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that he is the head of a family, owning neither town lots nor lands, and claims his statutory exceptions from the property in controversy.

For reply the plaintiff admits the execution of the agreement on the 10th day of February, 1883, and alleges that during the time it was in force he had advanced the defendant large sums of money under said agreement, and had furnished him live stock and implements, so that on the 21st day of February, 1888, defendant was indebted to him in a large amount, and on that day they had a full and complete settlement of all matters of account on either side, at which it was found that defendant was indebted to him in the sum of \$23,331, after deducting all credits, including all of the items set out in the answer. He denies the payment of \$4,271.35 on that day as well as the \$5,000 by check on the bank of Scroggin & Son, and denies that there had been a settlement at any time anterior to said date. He further alleges that he furnished to defendant the \$8,762.30 mentioned in the agreement of February 10, 1883, and denies all other allegations of the answer.

The other defendants by answer pleaded their judgments against McClelland and claim to recover under the provisions of sec. 1 of the act approved February 19, 1877, Comp. Stats., chap. 32, sec. 26. The issues having been made up the cause was referred by the district court to Hon. E. F. Warren, with instructions to hear the evidence and report his findings of fact and conclusions of law to the court at a succeeding term thereof. Subsequently the report of the referee was filed, in which he found for the plaintiff below against all of the defendants. Exceptions to several of the findings by the defendants having been overruled, judgment was entered for the plaintiff below in accordance with the recommendation of the referee, and the case was removed to this court by petition in error. The report is too voluminous to set out at length in this opinion, while the evidence comprises five large volumes of

printed matter. Counsel for plaintiffs in error, realizing the difficulty under which we would labor in examining such a mass of evidence, have pointed out in their brief the parts thereof essential to an examination of all questions now at issue. We have carefully and patiently examined the proofs in question and are entirely satisfied with the conclusion of the district court.

Accompanying his report, the referee filed a written opinion which we find in the record, in which the questions involved are ably and fully discussed. Believing that the profession of the state is entitled to the benefit of his labor and learning, we copy it in full below, accepting his conclusion as the law of the case:

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| "LEONARD K. SCROGGIN, | } |
| Plaintiff, | |
| v. | |
| JOHN W. McCLELLAND ET AL., | |
| Defendants. | } |

"On the 21st day of February, 1888, the plaintiff and the defendant, John W. McClelland, entered into a written contract, which was in renewal of one containing similar provisions dated February 10, 1883, whereby said Scroggin leased to McClelland a section of land in Nuckolls county, Nebraska, for a term of years, with certain rents reserved; the contract then proceeds:

"Said Scroggin agrees to loan to said McClelland the following property to be used on said farm, to wit: (Here follows a description of the cattle, horses, and stock.) And it is further agreed that when the said McClelland shall pay to said Scroggin the sum of \$23,331, with the interest thereon at the rate of ten per cent per annum, together with the rents above specified, and all sums of money that said Scroggin may advance to or for said McClelland, with the interest thereon, then all the above described property (chattels) shall be conveyed to said second party by said Scroggin, together with the increase thereof; until such

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payment such property shall be and remain the property of the said Scroggin.'

"Certain judgment creditors of the said McClelland levied upon the chattels, or some of them, and I have found, as a matter of fact, that they had no actual knowledge or notice of any claims of the plaintiff, and, while the contract was recorded as a chattel mortgage, it had annexed thereto no affidavit so as to make it constructive notice, if the instrument be construed as one of conditional sale. As between these creditors and the plaintiff, the question to be determined is: What is the legal force and effect of said contract? Is it 'a sale, contract, or lease, wherein the transfer of the title or ownership of personal property is made to depend on any condition?' If so, it is void as against such judgment creditors, without notice, of the vendee or lessee in the actual possession of the chattels. (Sec. 26, chap. 32, Comp. Stats.) But if it is a mere agreement to sell, or a bailment, coupled with the provision that the bailee or promisee may have the option of purchasing the chattels, it will not fall within the provisions of said section, and so need not have been recorded, or verified, as therein provided.

"Before the passage of the act of 1877, which is taken, in the main, from the Iowa statutes, a sale upon condition, reserving the title in the vendor, was held good as against purchasers and creditors of the vendee without notice. (*Aultman v. Mallory*, 5 Neb., 178; *Blunk v. Kelley*, 9 Id., 441.) And such is the general rule in the absence of a controlling statute, and no further authorities need be cited to sustain the position. But cases are found in which, under the guise of a lease, the title to personal property is reserved in the vendor or lessor. Familiar examples are found in the leases of sewing-machines or pianos, cars, and agricultural implements. Such contracts are held to be conditional sales—that is, sales with a condition that the title shall remain in the vendor until the

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property is paid for. (*Murch v. Wright*, 46 Ill., 487; *Mich. Cent. R. Co. v. Phillips*, 60 Id., 190; *Heryford v. Davis*, 102 U. S., 235; *Hervey v. Rhode Island Locomotive Works*, 93 Id., 664.) And in all such cases, while as between the parties the title does not pass, they are held to be really sales upon condition, and so invalid as to purchasers and creditors without notice, under a statute similar to ours.

“Therefore, the first inquiry here is: Is there any sale of any kind, conditional or otherwise, of the chattels by Scroggin to McClelland? If there was no sale, but only *an agreement for a sale*, then not only would no title pass to the promisee, but it was unnecessary to record the instrument for the purpose of giving constructive notice to creditors and purchasers. A sale ‘upon condition’ invariably presupposes a *sale*. The language of the contract under consideration is, that on payment of a stated amount by McClelland, Scroggin will convey the chattels to him. Here there is no sale, since McClelland does not agree to purchase, and the minds of the parties have not met upon any such proposition; he does not agree to pay any amount whatever for the chattels; the essential elements, or some of them, of a sale, are wanting. ‘To constitute a valid sale, there must be a concurrence of the following elements, viz: (1st) Parties competent to contract; (2d) Mutual assent; (3d) A thing, the absolute or general property in which is transferred from the seller to the buyer; and (4th) A price in money paid or promised.’ (Benjamin, Sales, sec. 1.) Here, at most, there are but the first two requisites of a sale. In every conditional sale, or sale upon condition, the vendor can waive the condition and sue for the purchase price; this is one criterion. Here McClelland had agreed to nothing; he had merely an option of purchase—an agreement to sell upon compliance with certain conditions, and it is not claimed that those conditions have been complied with. Scroggin could not

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sue for the purchase price on the contract, and herein the case at bar differs from the sewing machine, piano, and other like cases; in those the vendee has agreed to pay the 'rents' reserved, and it is provided that on payment of the last installment the chattel is to be the property of the lessee, or that the vendor will then execute a bill of sale therefor. In case of the loss of these chattels by an epidemic upon whom would the loss have fallen? Upon Scroggin or upon McClelland? Clearly upon the plaintiff, since there was no sale.

"Sec. 26 of chap. 32, Comp. Stats., is similar to the provisions of sec. 1922 of the Iowa Code, and was taken therefrom. The judicial construction given to the section by the supreme court of Iowa was also adopted by the legislature of Nebraska in enacting it. (*Campbell v. Quinlin*, 3 Scam. [Ill.], 288; *Martin v. Judd*, 81 Ill., 488; *Hopkins v. Medley*, 97 Id., 404.)

"In *Budlong v. Cottrell*, 64 Iowa, 235, Cottrell ordered from Budlong nineteen harrows, thirty cultivators, and other property, all with the prices carried out, and the contract contained a stipulation to pay the price in these words: 'We agree to settle for all goods herewith and subsequently ordered by giving our notes. The title, ownership, and right of possession shall be and remain in Budlong until settled for as provided in this contract.' Cottrell mortgaged the goods before a settlement, and the question was as between the 'owners' and such mortgagees, there being no record of the contract under sec. 1922 of the Iowa Code. The court says: 'The theory of the contract is that it was to be fully executed by both parties at substantially the same time, and that until fully executed neither the title to the property nor any right or interest therein should pass.' And the court held it to be neither 'a sale, contract, or lease' within the meaning of said sec. 1922. (See also *Colton v. Wise*, 7 Brad. [Ill. App.], 395; *Hunt v. Wyman*, 100 Mass., 199; *Emerson v. Fisk*, 6 Greenl. [Me.]

200; *Weir Plow Co. v. Porter*, 82 Mo., 23; *Mowbray v. Cady*, 40 Ia., 604.)

"In *Austin v. Dye*, 46 N. Y., 500, the court says: 'It is well established that neither an ordinary bailee of property nor any one having possession under an executory agreement to purchase can give title thereto to a purchaser, although the latter acts in good faith and parts with value without knowledge or notice of the want of title of his vendor, or that third parties have claims upon the property.' And in *Comer v. Cunningham*, 77 N. Y., 398, the court reviews the cases and draws the distinction made in the case at bar.

"*Chamberlain v. Smith*, 44 Pa. St., 431, was a case where one McWharter took from Benson chattels under the following contract: 'Received of John Benson one pair of three-year-old past stags to keep and work for the term of one year; said cattle to be returned in one year. But said McWharter has the privilege, by paying \$40 and legal interest at the expiration of the year, to keep said cattle.' Held, a bailment and not a conditional sale. To the same effect, *Becker v. Smith*, 59 Pa. St., 469; *Middleton v. Stone*, 111 Id., 596.

"In *Hart v. Carpenter*, 24 Conn., 426, C. put one Beebee in possession of a cow under the following contract: 'Beebee to keep and fodder, paying himself therefor out of the milk and butter, and if at any time within four months, or at the expiration of four months, said B. should pay for said cow \$35, then, on payment, the title of said cow shall vest in said B., but if within said time he shall not pay said amount,' the cow was to be returned. Held, a mere letting of the cow, with the privilege of purchase by paying the stipulated price, and not a sale either absolute or conditional. And the purchaser Hart, without notice of Carpenter's rights, obtained no title to the cow. •In this case it will be noticed that Beebee promised to pay nothing; he did not agree to purchase; he could not have been sued

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for the contract price; and therein it is analogous to the case at bar.

“In *Lickbarrow v. Mason*, Smith’s Lead. Cas., vol. I, pt. II, p. 1227, it is said: ‘There is more plausibility than force in the argument that a man who enables another to establish a false credit by intrusting him with the possession of goods should bear the loss if third parties are deceived. Personal property would be comparatively valueless to the owner if he could not suffer it to go out of his keeping into that of a bailee or agent without enabling the latter to pass the title by a fraudulent sale.’

“In cases cited by counsel for creditors to show the transaction in the case at bar to be a conditional sale, there is always a promise by the vendee or promise to pay for the chattels or goods delivered; and in such cases, no matter under what form the transaction is disguised, it is held to be a conditional sale, and not a bailment. (See *Bryant v. Crosby*, 36 Me., 562; *Plummer v. Shirley*, 16 Ind., 380; *Rowan v. Union Arms Co.*, 36 Vt., 129.)

“In *Miles v. Edsall*, 14 Pac. Rep. [Mont.], 701, Edsall leased to Murphy cattle at a certain rent, with the understanding that the tenant might purchase at any time during the hiring, at a certain price, by paying the difference between the rent paid and such price, the title meanwhile remaining in the lessor; it was held that the transaction was valid as lease with the privilege of purchase, and the chattels were not liable for the debts of the lessee.

“The supreme court of the United States, in the recent case of *Harkness v. Russell*, 118 U. S., 663, have considered this question, only that the facts in that case were more favorable to the creditors than in the one at bar. There Russell delivered to Phelan & Ferguson certain boilers and engines, upon the express condition that the title should remain in the vendors until payment. Russell took the vendees’ notes for the price; some of the notes had been paid; Phelan & Ferguson sold the machinery to

a third party. The case arose under the statutes of Idaho, which contain a provision with regard to the affidavit required to be filed similar to ours. In a long and well considered opinion the court, by Bradley, J., says, the first question to be decided is 'whether the transaction was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money.' If the latter, it was conceded to be void as against third parties because not verified by affidavit, and not recorded as required by the laws of Idaho. The court held it to be an agreement for a conditional sale, and in conclusion says: 'It is only necessary to add, that there is nothing, either in the statute or adjudged law of Idaho, to prevent, in this case, the operation of the general rule, which we regard as established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.'

"If these views are correct, it follows that the judgment creditors of John W. McClelland acquired nothing by the levy of their executions upon the chattels in the possession of the defendant McClelland, and that, as against them, the plaintiff must recover.

"In this discussion I have treated the instrument as in no sense a mortgage taken by Scroggin to secure a debt. It is true that the contract speaks of the 'debt' and the 'indebtedness' owing by McClelland to Scroggin, and provides that in case any of the cattle are sold with the plaintiff's consent, the proceeds shall be applied 'upon the above indebtedness,' yet I do not consider such carelessness and in-

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artistic expressions as controlling, or as overruling the plain import of the language used elsewhere. But, if it were the fact that the relation of debtor and creditor existed under the contract, and if the contract is to be construed as a mortgage given to secure the same, the judgment creditors will be in no better position, since the contract was recorded as a chattel mortgage in Nuckolls county, and, therefore, was constructive notice to all persons. But the creditors themselves strenuously insist that the instrument must be construed as one of conditional sale, and not a mortgage.

"The only question of fact worthy to be considered here is that relating to the alleged application of the \$20,000, deposited in the bank of Scroggin & Son, at Mt. Pulaski, Ill., by the defendant John W. McClelland. The plaintiff claims, and so testifies, that all those moneys were applied to the payment of the notes and drafts given by the defendant; McClelland swears that not one dollar of that sum was so applied, but further, that it was agreed between himself and the plaintiff, on February 21, 1888, that that sum stood to McClelland's credit on the books of the bank, and was to be credited, with other items, upon the \$23,331 mentioned in the contract, whenever they should have a final settlement at the end of two years. To determine this question I have gone into the accounting between the parties since the date of the first contract in 1883; I have charged McClelland with all sums of money he admits having received from Scroggin, or that the proofs show that he did receive. He admits that on February 21, 1888, the plaintiff surrendered to him unpaid notes and drafts amounting, with interest, to the sum of \$21,015.73. A large number of similar notes and drafts had been paid and taken up by McClelland before that time, but there is no evidence as to the time when they were so paid, nor when the moneys on deposit were applied thereto, if they were so applied. I have, therefore, charged McClelland in-

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terest on all those notes and drafts to an arbitrary date—the date of the last settlement, February 21, 1888—and have allowed interest on the deposits to the same date; this method does injustice to neither. And the figures show that prior to that date McClelland was properly chargeable with notes and drafts, including interest, to the amount of \$28,501.96; and that he had paid about \$29,500. How was this large sum of money paid? McClelland attempts to show two cash payments, one of \$2,500, made to Scroggin in Kansas, and another of \$4,271.35, made at the date of settlement, February 21, 1888. The plaintiff swears positively that no such cash payments were ever made to him; while McClelland is corroborated as to the first transaction by his brother George, and as to the latter by his wife, his brother-in-law, and his young son.

“It will perhaps be sufficient to say that the court could not, and cannot, accept as conclusive the evidence of these payments, contradicted as they are by the circumstances surrounding the transactions. Men do not do business in that way. It is incredible that McClelland should have had in his possession large sums of money, of cash, amounting to thousands of dollars, and at the same time be so hard pressed for cash that he could not and did not pay his hired hands their wages, but gave his notes at ten per cent interest therefor, and should suffer his bank account to be overdrawn for small amounts for weeks at a time with the consequent loss of credit. He at the same time was borrowing large sums of money of Scroggin and paying ten per cent interest on the loans. And when pressed to explain his possession and acquisition of such large sums of money, and how he came to receive it to put into a satchel, which resembled the widow’s cruse of oil, he refuses absolutely to answer, refuses to explain the source of his income, refuses to tell from whom it was derived, shielding himself from answering behind the provisions of the statute which protect a witness from testify-

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ing when his answers may subject him to a criminal prosecution, or tend to expose him to public infamy and ignominy. The court is asked to believe that the defendant did business as no other man ever did business before under similar circumstances. The court is the keeper of no man's conscience, and unless bound by the evidence of four witnesses as against one, and all unimpeached, must reject the testimony as too improbable for belief. A boat is missing from its moorings on the Missouri river; it is found six miles above on a sand bar upon the premises and under the control of an individual who, when called upon to account for the possession of the boat, brings into court a half dozen unimpeached witnesses, who testify that they saw the boat floating up the stream without other motive power than that afforded by the current itself. Is the court bound to accept the testimony as true, even if uncontradicted? I doubt it. (*Elwood v. Western Union Tel. Co.*, 45 N. Y., 549; *Koehler v. Adler*, 78 Id., 291.) The story of these cash payments, taken in the light of the surrounding circumstances, is as improbable, if not impossible, as would be the floating of boats up the current of the Missouri river by force of the current alone. The mind rejects it as untrue.

"Throwing those two items out of the account, therefore, and giving to McClelland credit for all sums he has proved he paid to Scroggin, and we find that he has paid about \$29,500; that is, very nearly the amount of the deposits and interest, and the \$6,000 of drafts and interest. The slight difference between this sum and amount with which he is properly chargeable is easily accounted for by the allowance of interest, or mistake in computation, and the coincidence is startling. He had owed about \$28,500, and he had paid about \$29,500, if we include in such payments the moneys deposited in the bank at Mt. Pulaski. If these moneys are deducted, if they still stand to his credit, how has he shown payment of the notes and drafts?

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“Let us tabulate the figures:

“John W. McClelland,

“In account with Leonard K. Scroggin.

Dr.

| | |
|--|-------------|
| To notes surrendered Feb. 21, 1888..... | \$21,015 73 |
| notes paid prior to Feb. 21, 1888..... | 28,501 96 |
| rent of 'home farm' for 1886 and 1887... | 1,000 00 |
| products of other farms for 1886 and 1887, | 2,315 27 |
| amount due on contract of 1883..... | 13,170 07 |
| | <hr/> |
| Total indebtedness..... | \$66,003 03 |

Cr.

| | |
|-------------------------------|--------------|
| By deposits and interest..... | \$22,321 17 |
| real estate taxes paid..... | 1,279 13 |
| improvements 'home farm'... | 3,498 00 |
| improvements other farms..... | 1,000 00 |
| drafts and interest..... | 7,231 94 |
| check of Feb. 21, 1888..... | 5,000 00 |
| services rendered..... | 2,500 00 |
| | <hr/> |
| | 42,830 24 |
| | <hr/> |
| Balance due Scroggin..... | \$23,172 79' |

“The closeness of these figures to the amount stated in the contract of February 21, 1888, is another of the significant coincidences of this startling case. They agree to within \$160, and that difference easily explainable as an honest mistake, error in computing or otherwise, and would have justified the referee in finding as a fact in this case, that on the 21st day of February, 1888, the parties did have a settlement and accounting and the balance of \$23,331 was found due to the plaintiff, as he alleges. Here is further confirmation of the fact that the moneys in bank at Mt. Pulaski were in truth applied to the payment of the notes and drafts of McClelland. McClelland has shown no sources from which he could have paid them, outside of

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the deposits. But there is one other, and a conclusive reason why it must be so: the written contract between the parties provided that the proceeds of all sales should be so applied. It was ample authority to Scroggin, without a special transfer thereof on the books of the bank, to so apply them.

"To have found as a fact that such settlement, accounting, and balance due were had and found on said date as a fact herein, would have saved the referee a vast amount of labor and comparison of figures, but would have been convincing, nor satisfactory, to neither of the parties to the action; while the tabulating of the figures and the statement of the accounts from the commencement of their dealings give almost a mathematical demonstration that we have arrived at a correct conclusion in the case.

"Respectfully submitted.

"E. F. WARREN, *Referee.*"

There being no error apparent of record the judgment should be

AFFIRMED.

THE other judges concur.

MILWAUKEE & WYOMING INVESTMENT COMPANY V.
ADDISON B. JOHNSTON ET AL.

[FILED OCTOBER 26, 1892.]

1. **Principal and Agent: AGENT'S AUTHORITY: USAGE: LIMITATIONS.** Where a principal empowers an agent to transact business with respect to which there is a well defined and publicly known usage, the presumption is, in the absence of facts indicating a different intent, that such authority was conferred in contemplation of such usage, and persons dealing with such agent in good faith will not be bound by limitations upon such usual authority.

| | |
|----|-----|
| 36 | 554 |
| 46 | 495 |
| 35 | 554 |
| 47 | 308 |
| 35 | 554 |
| 49 | 72 |
| 50 | 465 |
| 52 | 14 |
| 52 | 409 |

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2. ———: ———: ———. But such usage, to bind a principal, must have existed for such a time, and become so widely and generally known, as to warrant the presumption that he had it in view at the time of the appointment of the agent.
3. ———: ———: ———: RULE APPLIED. The M. & W. I. Co., a Wisconsin corporation owning a cattle ranch in Wyoming, appointed one A. its agent in Wyoming with limited power, viz., to hire and pay for the necessary help, and pay the current expenses with money remitted on his statement, and to care for and round up the cattle and ship them when fit for market to Chicago in care of a particular commission house. In an action of replevin by the company aforesaid against J. & R., to recover cattle claimed by the latter to have been purchased from A. on the ranch aforesaid, *held*, error to receive evidence on the part of the defendants to prove that, at the time they purchased the cattle from A., it was the custom or usage of managers of cattle companies doing business in Wyoming to sell the cattle from the ranches of such companies, in the absence of any evidence that the plaintiff company had knowledge of such usage.

ERROR to the district court for Merrick county. Tried below before MARSHALL, J.

George H. Noyes, and *J. W. Sparks*, for plaintiff in error:

Where authority is conferred by an express agreement the extent thereof must be ascertained from the agreement or instrument itself, and cannot be enlarged, modified, or controlled by evidence of implied authority at variance with that which was given expressly. (Story, Agency, sec. 76; *Schooner Reeside*, 2 Sumner [U. S.], 567; *Dickinson v. Gay*, 7 Allen [Mass.], 29; 1 Greenleaf, Ev., sec. 292, 293; Mechem, Agency, sec. 274; *Hopper v. Sage*, 112 N. Y., 530.) Usage cannot enlarge or vary the authority or character of an agent, where such powers or authority have been conferred by express contract, or by instrument in writing. (*Robinson v. Mollett*, L. R. 7, H. L. [Eng.], 802; *Higgins v. Moore*, 34 N. Y., 417; *Hibbard v. Peek*, 75 Wis., 619; *Lamb v. Henderson*, 63 Mich., 302; Story,

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Agency, sec. 76; *Assurance Soc. v. Ins. Co.*, 84 Va., 116; *Hermann v. Ins. Co.*, 100 N. Y., 411; 2 Parsons, Contracts, 546; *Graves v. Horton*, 38 Minn., 66; *Lucke v. Yoakum*, 25 Neb., 427; *Wanless v. McCandless*, 38 Ia., 24; *Bradley v. Wheeler*, 44 N. Y., 503.) Plaintiff must be shown to have knowledge of custom before it can be bound by it. (Mechem, Agency, sec. 262; *Walls v. Bailey*, 49 N. Y., 464; *Barnard v. Kellogg*, 10 Wall. [U. S.], 383; *Hopper v. Sage*, 112 N. Y., 530; *Pickert v. Marston*, 68 Wis., 465; *Power v. Kane*, 5 Id., 268; *Hall v. Storrs*, 7 Id., 277.) Every person who contracts with the officers or agents of a corporation must at his peril take notice of the limits of their powers. (*Wheeler v. Plattsmouth*, 7 Neb., 270, 279; *Graul v. Strutzel*, 53 Ia., 712, 715; *N. Y. I. M. v. Negaunee Bank*, 39 Mich., 644.) Representations by agent cannot establish fact of agency. (*Bond v. R. Co.*, 62 Mich., 643; *Delta Lumber Co. v. Williams*, 73 Id., 86.) Agent had no implied authority to sell. To authorize an inference of authority where none is expressly conferred, it must be practically indispensable to the execution of the duties really delegated. (*Bickford v. Menier*, 107 N. Y., 490; *Dodge v. McDonnell*, 14 Wis., 553*; *Coquillard's Adm'r v. French*, 19 Ind., 274; *Billings v. Morrow*, 7 Cal., 171; *Hodge v. Combs*, 1 Black [U. S.], 192.)

John L. Webster, contra, cited: *Spangler v. Butterfield*, 6 Col., 356; *Sacalaris v. E. & P. Co.*, 18 Nev., 155; *Adams M. Co. v. Senter*, 26 Mich., 73; *Grafins v. Land Co.*, 3 Phila., 447; *Lee v. Pitts C. M. Co.*, 56 How. Pr. [N. Y.], 376; *Griswold v. Gebbie*, 126 Pa. St., 353; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y., 415; *McKiernan v. Lenzen*, 56 Cal., 61; *Antoine v. Smith*, 40 La. Ann., 560; *Brooks v. Martin*, 2 Wall. [U. S.], 70; *Niemeyer v. Wright*, 75 Va., 239; *Pratt v. Short*, 79 N. Y., 437; *Prince v. Church*, 20 Mo. App., 332; *Bowditch v. Ins. Co.*, 141 Mass., 292; *Larned v. Andrews*, 106 Mass., 435; *DeMers v. Daniels*, 39 Minn., 158.

A. Ewing, also, for defendants in error.

Post, J.

This was an action of replevin commenced by the plaintiff in error, a corporation organized under the laws of the state of Wisconsin, to recover the possession of 250 head of cattle. The plaintiff is organized for the purpose of acquiring land in Wyoming and raising and selling cattle therefrom. Its capital stock is \$500,000, and its business is managed by a board of directors. It owns and carries on a ranch with a large number of cattle in Wyoming. By its by-laws, all deeds, contracts, and other instruments in writing to which the company may be a party, are required to be signed by its president and secretary, which latter officer is to affix the seal thereto. The president is invested with the general care and supervision of the affairs and property of the company. It is the duty of the treasurer to receive and pay all moneys, and he is custodian of contracts and other papers belonging to the company. The by-laws provide that there may be appointed, by the board of directors or executive committee, a manager and subordinate officers and agents, and further that the manager shall reside and keep his office in the territory of Wyoming, and shall have the charge and management, subject to the orders of the directors, of all the affairs and property of the company. He may appoint employes and agents necessary to protect and take care of the property and interests of the company, and fix their salaries subject to the approval of the board or the executive committee. He is prohibited from contracting any debt or entering into any contract involving an expenditure of more than \$500, unless specially authorized by the directors or executive committee. The office of the company is to be in Milwaukee as well as those of the secretary and treasurer.

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The testimony on behalf of the plaintiff was, in substance, that George Mitchell, a stockholder, director, and vice president of the company, managed its affairs in Wyoming down to the fall of 1887, when one Chadwick acted in that capacity until the fall of 1888, but neither had authority to sell the cattle, but shipped them as directed, to the commission house of Geo. Adams & Burke, Chicago, to sell and remit the proceeds to the treasurer at Milwaukee. At a meeting of the board of directors of the plaintiff, held in Milwaukee, July 7, 1887, the president was instructed to make such changes in the management of the ranch as might in his judgment be necessary for its more economical management, and that, in pursuance of such instructions, in November, 1888, he employed one Thomas R. Adams to perform certain specified duties on the ranch, instructing him to purchase supplies therefor, hire the men, and send in the accounts monthly to the treasurer at Milwaukee, who would remit the money for the payment thereof; to gather the cattle on the round up and ship them to George Adams & Burke, Chicago. Adams was given no authority to ship cattle elsewhere, nor was he authorized to sell or dispose of the cattle at any time or in any way or place. He had specific instructions from the officers of the plaintiff company not to sell any cattle from the ranch. These instructions were verbal, given him at the time of his employment and never modified thereafter. In addition to the above terms of hiring, there was no official or corporate action appointing Adams as manager, and no record in the minutes of the company of his employment. He had instructions in writing from the president of the company on or about the 20th of July, 1888, to consign about 300 four-year-old steers and 400 three-year-old steers to George Adams & Burke, billing them by the way of Omaha to Chicago to be sold at one or the other of such places by such commission house. It also appears undisputed by the record that

Adams had never sold any cattle prior to the time in question. It also appears to be undisputed that he had never sold anything from the ranch except some old fence wire, and exchanged with a neighboring ranch a part of a cow killed for beef, but such facts are unknown to plaintiff, or any of its officers or directors prior to the time of the institution of this suit.

The testimony on behalf of the defendants shows that in October, 1889, said Adams, through one T. D. Perrine, a cattle salesman of Omaha, negotiated a sale of 250 head of three and four year steers from the plaintiff's ranch to the defendants, at \$22 per head; that the defendants were in Wyoming at the time of such transfer, and having been informed by Perrine of Adams' offer, directed the latter to look the cattle over and select 250 head from them and take charge of their shipment to Central City, Nebraska. Rush wrote out a check for \$1,000 on a bank of Pittsburg, Pennsylvania, payable to Thomas Adams, which he gave to Perrine to be delivered to Adams as part payment for the cattle. The testimony is, that he made the check payable to Adams instead of to the company or its treasurer, or other of its officials, because at the time he could not think of the name of the company. A day or two after the delivery of the first check, Rush gave Perrine another check for \$4,000, payable to Adams on a bank in Chicago, and authorized Adams to draw for the balance. Perrine deposited, in a bank at Cheyenne, Rush's check for \$1,000, November 1, 1889; the check for \$4,000, November 11, 1889, and a check for \$480, on the 14th of November, 1889. This money was all checked out by Adams for his own use. This transaction with Adams was the first one that was ever had with him, either by Perrine or the defendants. Nor had either Perrine or the defendants ever before dealt with the plaintiff or any of its officers or employees, nor was it shown that either of the defendants had ever heard of a similar transaction by Adams. Soon after

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this transaction Adams left the ranch and ran off to Canada. It appears that no bill of sale or other instrument, in writing, was delivered by Adams or received by the defendants for the cattle, and that no writing of any kind passed between them in the negotiations for, or the consummation of, the transfer and delivery of the cattle. The defendants, over the objections of the plaintiff, were permitted at the trial to show that there existed in the territory of Wyoming, at the time in question, a custom or usage for the manager or general manager of cattle ranches or cattle companies doing business in that territory to sell the cattle from the ranches, and that said Adams was such manager, as would, under such a custom of usage, be empowered to make a valid sale of cattle on the ranch. There is no evidence tending to prove that plaintiff or any of its officers had knowledge of such a custom or usage. On the other hand the positive evidence of all of such officers is, that if any such usage existed at the time in question it had never been heard of by them. The rule is, that where a principal entrusts to his agent the management of business with respect to which there is a known and generally recognized usage, as to third persons dealing with such agent the principal will be held to have intended him to act in accordance with such usage, and in the absence of notice thereof third parties will not be bound by any limitation upon such usual authority. But this rule has its limitations. For instance, it is said by Mechem in his recent work on the Law of Agency, sec. 281: "In order to give the usage this effect it must be reasonable; it must not violate positive law, and it must have existed for such a time and become so widely and generally known as to warrant the presumption that the principal had it in view at the time of the appointment of the agent; but if the usage was a purely local and particular one, the principal may repel this presumption of knowledge by showing that in fact he had no notice of it;" and the doctrine of the cases in this country

may be summarized thus—Custom or usage in a trade or business may be shown for the purpose of interpreting a contract or controlling its execution, but not for the purpose of changing its intrinsic character, provided it is known to the party sought to be charged thereby, or is so well settled and so uniformly acted upon as to create a reasonable presumption that it was known to both contracting parties and that they contracted with reference to it. (*Bradley v. Wheeler*, 44 N. Y., 495; *Walls v. Bailey*, 49 Id., 464; *Hopper v. Sage*, 112 Id., 530; *Paine v. Smith*, 33 Minn., 495; *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Id., 153; *Corcoran v. Chess*, 131 Pa. St., 356; *Brown v. Foster*, 113 Mass., 136; *Barnard v. Kellogg*, 10 Wall. [U. S.], 383; *Power v. Kane*, 5 Wis., 268; *Hall v. Storrs*, 7 Id., 253*; *Pickert v. Marston*, 68 Id., 465; *Raisin v. Clark*, 41 Md., 158; *Keystone v. Moies*, 28 Mo., 243; *Steele v. McTyers Adm'r*, 31 Ala., 677; *Reynolds v. Ins. Co.*, 36 Mich., 142.)

In Evans on the Law of Principal and Agent, 544, is cited with approval the case of *Robinson v. Mollett*, 7 Eng. & Ir. App. L. R., 802, which is quite similar to this. In that case it is said by Lord Chelmsford: "The effect of this custom is to change the character of a broker who is agent to buy for his employer into that of a principal to sell for him. No doubt a person employing a broker may engage his services upon any terms he pleases, and if a person employs a broker to transact business for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character. * * * Of course if the appellant knew of the existence of the usage and chose to employ the respondents without any restrictions upon them, he might be taken to have authorized them to act for him in conformity to such usage." He further says that such usage should have no application to a person ignorant of

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its existence, particularly where it would give the agent an interest wholly opposed to that of his principal. It will be noticed (1) that the usage proved in this case is local in its application, since it is confined to the territory (now state) of Wyoming only; (2) the managing officers of plaintiff were ignorant of it if any such custom existed; (3) there is no evidence in the record which warrants the presumption that plaintiff, in appointing Adams as its agent, acted with reference to such a usage. The question at issue is the apparent scope or extent of Adams's authority with respect to the cattle on the ranch, and whether, under the circumstances of the case, strangers dealing with him were justified in assuming that he was authorized to sell and dispose of them. That question is to be determined (1) from the authority actually given by the plaintiff; (2) from the conduct of the parties with respect to the ranch and the property thereon. For it will not be questioned that if the conduct of Adams in that respect, within plaintiff's knowledge, was such as to warrant the defendants in believing that he was authorized to sell the cattle on the ranch, and that they bought and paid for them relying upon such apparent authority, the plaintiff would now be estopped to deny their title, whatever may have been the authority actually conferred by it upon its said agent.

We think that the court erred, therefore, in receiving evidence of a usage for managers to sell cattle, the product of the ranches of Wyoming. It is, without doubt, competent for persons or corporations engaged in a like business to entrust to a manager or general agent the power to sell and dispose of their property. It may be further admitted that said authority has been conferred by a majority of cattle companies doing business in that state. But the rule contended for by defendants in this case would, in our opinion, prove subversive of the interests such companies are intended to promote. Since the judgment must be reversed, for reasons stated, it is not deemed necessary to consider the

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other questions presented. With respect to the sufficiency of the evidence it may be said that we are not at liberty to presume that the same evidence will be adduced on a second trial. We have therefore no occasion to express an opinion upon that question. The judgment of the district court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

J. P. ALBERT, APPELLANT, V. JAMES P. TWOHIG,
COUNTY CLERK, ET AL., APPELLEES.

[FILED NOVEMBER 2, 1892.]

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|-----|-----|
| 35 | 563 |
| 140 | 142 |
| 35 | 563 |
| 42 | 770 |
| 35 | 563 |
| 46 | 773 |

1. **Contest of Election: EVIDENCE: PRESERVATION OF BALLOTS.** In a contest of election the ballots cast at the election constitute the primary evidence to determine the rights of the respective parties. It must appear, however, that they have been preserved substantially in the manner and by the officers prescribed by the statute. If they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed up by the several election boards.
2. ———: **JURISDICTION OF DISTRICT COURT.** The district court has jurisdiction in case of contested election in relation to township organization.
3. **Statutes: VALIDITY: REPEAL BY IMPLICATION.** Repeal by implication is not favored, and a statute will not be declared so repealed unless the repugnancy between the new statute and the old one is plain and unavoidable.
4. ———: ———: **TOWNSHIP ORGANIZATION.** *Held,* That the several statutes in relation to township organization to which objections are made are valid and are to be construed together; that section 7 of the act of 1891 in reference to elections, was

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designed to apply to future elections and does not affect art. 4, sec. 4, chap. 18, Comp. Stats., which provides for temporary organization.

APPEAL from the district court for Dakota county.
Heard below before NORRIS, J.

Davis, Gantt & Briggs, for appellant.

Barnes & Tyler, and *Jay & Beck*, contra.

MAXWELL, CH. J.

Contestant alleges that he is an elector of Dakota county, competent to bring the action; that James P. Twohig is the duly elected, qualified, and acting county clerk of Dakota county; that Wm. Taylor, M. Beacon, and J. O. Fisher are duly elected, qualified, and acting board of commissioners of said county; that E. B. Wilbur, E. L. Wilbur, and C. D. Smiley are residents and electors of said county, and as such, with certain other electors, to the number of thirty-five, signed a petition which was filed on the 13th of August, 1891, in the office of the county clerk of Dakota county, and which asked the board of commissioners to submit to the voters of Dakota county the question of township organization, at the general election held on the 3d day of November, 1891; that this question was submitted and voted on at said election, and that the highest number of votes cast at said election, for any office, was fifteen hundred, and on the question of township organization there was cast for township organization 826, and against township organization 154, and that 620 of the electors voting at said election did not vote on said question; that the canvass of votes showed an apparent majority of 52 for township organization and the same was declared to be carried.

As the grounds of the contest, the contestant alleges that the election is illegal and void—first, because the act of

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the legislature, providing for township organization, is unconstitutional; second, because the act of the legislature providing for township organization is incomplete by reason of defects and omissions in the act providing for the same, and it is impossible to organize and carry on the business of the county under the laws that now exist; third, because a part of the law relating to township organization was passed by the legislature of 1879, and incorporated in the acts of the legislature of 1879 under the head of revenue, as is found in said laws, being sections 62 to 72, inclusive, of said act in relation to counties, and 91 to 101, inclusive, under the head of revenue; and at the time of the passing of said act no provision had been made by the legislature providing for township organization, nor was any provision made until the session of 1883, at which time the act providing for township organization was passed; and said last act is incomplete without incorporating therewith the acts of 1879; and said acts are not in said act of 1883, or in any other act of the legislature referred to, or adopted or made a part of said law, or in any manner referred to; nor is the same adopted by any other act of the legislature passed before or since that date; and said act of 1883, and any amendment thereto made since, is incomplete and void without said acts of 1879 being considered therewith, for the further reason that the legislature of 1891, in chapter 23 of the laws of said session, amended section 7 of the Compiled Statutes, entitled Elections, and by said amendment repealed, by implication, that part of section 5 of the original act of 1883, and the amendment thereto, that provided for the election of supervisors at the same time the question of township organization was submitted to the electors, and by reason thereof the election of supervisors at said election is null and void; that no petition for the submission of said question, signed by fifty legal voters of said county, was filed with the county clerk and acted upon by the commissioners

in calling said election; that the commissioners of said county, in submitting said question to a vote, did not make any finding that a petition containing the names of more than fifty legal voters of said county had been presented to them asking that said question be submitted; that in each precinct in said county illegal votes were cast and counted, sufficient in number to change the result of the election, and by persons whose names are unknown to contestant.

In their answer the defendants allege: First, that the court has no jurisdiction to try and determine the questions raised by the petition. Second, that there is a defect of parties defendant in this cause. Third, denying that Albert, the contestant, is an elector of Dakota county, and competent to contest in this cause. There are a number of admissions that need not be noticed.

The cause was referred to a referee to take the testimony and find the facts. The referee took the testimony and made his report as follows :

“ I find that at the general election held on November 3, A. D. 1891, within Dakota county, Nebraska, the question of township organization was submitted to the electors of said county, and that the total vote on said question as returned by the several election boards of the county and as canvassed and declared by the canvassing board of said county, is as follows, to-wit:

| | |
|------------------------------------|-----|
| For township organization..... | 826 |
| Against township organization..... | 154 |

Leaving an apparent majority for township organization of..... 672

“ I further find that no return was made as to any double ballots being cast.

“ Second—I find that on the recount of the ballots of the several pccincts of said Dakota county, Nebraska, by me as referee, of the votes cast in said county at the general

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election held in said county on the 3d day of November, A. D. 1891, said ballots showed the following facts, to-wit :

| | |
|---|-----|
| For township organization..... | 697 |
| Against township organization..... | 162 |
| Ballots voted with two crosses, both for and against township organization..... | 136 |
| Ballots that were voted blank, neither for nor against township organization..... | 497 |
| Ballots not counted..... | 5 |

Total vote of county..... 1497

“Third—I find and report that the ballots of Covington precinct were in a ballot box which had been opened for the taking out of the poll book; and that the ballots of Omadi precinct were in a paper sack, a common grocery sack, and that the same were unsealed when they were given to me to recount; and that the ballots of St. John’s precinct were opened and unsealed when they were given to me to recount; and that the ballots of Hubbard precinct were tied in a compact, almost square bunch with a string through the center of them, and they were well sealed up in an envelope provided for that purpose, when they came into my hands for the purpose of the recount; and that the ballots of Dakota precinct were in a large package and apparently attempted to be sealed, but not much sealed when they came into my hands for the purpose of the recount; and that the ballots of Summit, Pigeon Creek, and Emerson precincts were apparently sealed up properly at the time they came into my hands for the purpose of the recount. I further find that the ballots of all eight precincts of Dakota county were on strings.

“Fourth—I find that the testimony taken by me, as hereto attached and herewith reported, of parts or all of the several members of the election boards of Covington, Omadi, St. John’s, and Hubbard precincts, tends to sustain and affirm the returns as made by them to the canvassing

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board of the county, as set forth in the poll books of the said several precincts, of the general election held on the 3d day of November, 1891, and as canvassed and declared by the canvassing board of said county.

“Fifth—I find that the testimony taken by me, as hereto attached and herewith reported, of parties other than the members of the several election boards mentioned in the fourth finding herein, tends to establish the fact that said ballots were in the condition, at the time I received them for the purpose of the recount herein, that they were in when they were first deposited in the vault of the county clerk of said Dakota county, Nebraska, after the official canvass of the vote of said several precincts was completed.

“Sixth—I find that the vault of the county clerk of Dakota county, Nebraska, wherein the ballots cast at the general election held in said county on the 3d day of November, 1891, were kept, is very unsafe and insecure, and that said vault is not kept locked either by day or night, and that said ballots were readily accessible to others than their proper custodians.”

It will thus be seen that the ballots from some of the precincts were not sealed up when sent to the county clerk and that they were not kept by him in a place free from access of persons generally. The court below refused, under these circumstances, to recount the ballots. Did it err?

The first objection of the defendant is to the jurisdiction of the court in case of contest of election. In *Burke v. Perry*, 26 Neb., 414, it was held, in effect, that a contest of election for county seat was an action and was properly brought in the district court. We see no reason to change our views in that regard and therefore hold that the court below had jurisdiction and that the case is properly here.

Second—As between the ballots cast at an election, and a canvass thereof by the election officers, the former are the primary and controlling evidence; but in order that they

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may continue controlling evidence it must appear that they have been preserved in the manner and by the officers prescribed by the statute. (*Hudson v. Solomon*, 19 Kan., 177.) In the case cited it is said: "It is a primary rule of elections that the ballots constitute the best, the primary evidence of the intentions and choice of the voters. (*State v. Judge*, 13 Ala., 805; *People v. Holden*, 28 Cal., 123; *McCrary*, Elections, secs. 291, 439; *Cooley's Const. Lim.*, 625.)

In the case from California the court uses this language: "Intrinsically considered, it must be conceded that the ballots themselves are more reliable, and therefore better evidence, than a mere summary from them. Into the latter errors may find their way, but with the former this cannot happen. The relation between the two is at least analogous to that of primary and secondary evidence." A canvass is but a count of the ballots, a convenient and expeditious method of determining the choice of the people as disclosed by the ballots, and therefore but secondary evidence. The necessities of the case make it *prima facie* evidence, but unless expressly so declared by statute it is never conclusive. (*State v. Marston*, 6 Kan., 524; *Russell v. State*, 11 Id., 308.)

As between, therefore, the ballots themselves and a canvass of the ballots, the ballots are controlling. This is, of course, upon the supposition that we have before us the very ballots that were cast by the voters. And this presents the difficult question in this case. For, as under the manner of our elections, there is nothing to distinguish one ballot from another of those cast by the members of the same party, as no file-mark or other mark is made in the canvass or otherwise after the election upon any ballot, by which its actual use at such election may thereafter be established, and as at any election there is always a large surplus of unused ballots, it is evident that if opportunity were offered ballots might be withdrawn from the box and

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others substituted, with but little chance of detection. Thus in the case before us, if there was but a single officer to elect, and but a single name on the ballot, how easily could one having access to the box throw in twenty-three or four additional ballots, and thus bring about the very difference that appears before us now. And who could thereafter tell which were actually voted, and which subsequently thrown in? The ballot, then, upon its face containing no marks of identification, we must look *aliunde* for evidence of the identity of those offered and counted before us with those actually cast at the election. And this evidence we find in the testimony as to the manner in which the ballots have been preserved, a comparison of the canvass made as to all the officers voted for at that election, with the result as shown by the ballots, and certain other circumstantial evidence; and it was held that the proof in regard to the safe keeping of the ballots in that case was sufficient to admit them as evidence.

The question was again before the supreme court of that state in *Dorey v. Lynn*, 31 Kan., 758, and it was held, "Where an election is held in a certain ward of a city for the election of councilmen, and the judges and clerks of the election count the ballots and place them in a sealed envelope, and then place the envelope with the ballots in the ballot box, and seal the ballot box and deliver the same to the city clerk, in whose custody they remain until the trial is had in the case, and this is shown by testimony of witnesses beyond all reasonable doubt, held, that the ballots are sufficiently identified and are controlling, although the city council, while acting as a board of canvassers did, in the presence of the city clerk, illegally open the envelope containing the ballots and count them."

These cases, in our view, state the law correctly. In the case at bar the proof fails to show that ballots from three of the precincts were preserved in the manner and by the officers prescribed by the statute.

If the loose methods which were adopted in this case as shown by the proof were held sufficient, it would be possible to change the result of any election and defeat the choice of the electors. It would have been an easy matter for a person so disposed to place one or more crosses opposite the proposition for or against township organization and thus render the ballot inoperative, and the very large number, viz., 136, with two crosses thereon, is suggestive of improper practice, particularly as no mention is made thereof by the various election boards. It is not very creditable to an official that the papers and ballots in his office are so carelessly kept that persons having no right to have access to them may handle or inspect them if they see fit, and the circumstances are such as to cast suspicion upon them. The court did not err, therefore, in rejecting the ballots.

Third—But it is claimed on behalf of the plaintiff that the several acts providing for township organization are unconstitutional and therefore void. The legislature of 1877 passed an act providing for township organization in certain cases. This act was declared invalid in *Jones v. Co. Com. of Lancaster Co.*, 6 Neb., 474, upon the ground that the title of the act was too restricted for the subject-matter of the act.

The revenue law of 1879 was amended so as to provide for the collection and disbursement of taxes in case of the adoption by any county of township organization. While it is true that there was no statute in existence at that time that authorized township organization, yet the provision above referred to in no manner affected county organization or the collection of the revenue, and could only become effective upon the adoption by any county of township organization.

In 1883 an act was passed to provide for township organization, and that, with the amendments thereto, constitute the law upon that subject at the present time. It

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is claimed, however, that the act of 1891 repealed by implication the township act of 1883.

The question of repeal by implication has been presented to this court in several cases and it has been uniformly held that a statute would not be repealed by implication unless the repugnancy between the new statute and the old is plain and unavoidable. (*White v. Lincoln*, 5 Neb., 505; *State v. McCall*, 9 Id., 203; *In re Hall*, 10 Id., 537; *Lawson v. Gibson*, 18 Id., 137; *State v. Babcock*, 21 Id., 599.) The statute of 1891 does not repeal the former act by implication.

Fourth—It is contended that section 7 of the election law as amended in 1891 repeals the provision for election of supervisors. In our view, however, the act in question merely provides for future elections and does not change the law in relation to election for township officers on temporary organization. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

FARMERS UNION INSURANCE COMPANY, MUTUAL, v.
STEPHEN WILDER.

[FILED NOVEMBER 2, 1892.]

1. **Mutual Fire Insurance: PREMIUM NOTES: ASSESSMENTS: JUDGMENT: EXECUTIONS.** Where premium notes have been given to a mutual insurance company, assessments to be made thereon from time to time as losses occur, in case an assessment is not paid in thirty days after personal demand therefor or by letter, the company may recover for the whole amount of the deposit note with costs, and executions will thereafter be issued on such judgment as assessments for losses may require.

2. ———: ASSESSMENTS: DEFAULT IN PAYMENT: FORFEITURE: WAIVER. Where there is a default in paying assessments and the company does not declare the policy forfeited, but continues to make further assessments as losses occur, it will be a waiver of the cause of forfeiture.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Thompson Bros., and Capps, McCreary & Stevens, for plaintiff in error.

Hewett & Olmstead, contra.

MAXWELL, CH. J.

This action was brought by defendant in error against the plaintiff in error to recover for the loss of a barn, etc. It is alleged in the petition:

“That at the time hereinafter mentioned the defendant was, and still is, a corporation duly organized under the laws of the state of Nebraska, with lawful authority to make contracts of insurance against fire.

“Second—On the 29th day of December, 1888, the plaintiff was the owner of a barn and granary situated on section 2, township 5, range 10 west, in Adams county, state of Nebraska, and a large amount of oats, to-wit, 2,000 bushels, in said granary, said barn and granary being adjoining each other, and together of the value of \$550, and the said corn in said granary being of the value of \$200.

“Third—On the 10th day of January, 1889, the defendant, in consideration of \$16 to it paid on the said 29th day of December, 1888, as a membership fee, and a further consideration of a premium contract for the sum of \$48, to be paid in assessments as specified, made, and delivered to the plaintiff a policy of insurance on said barn, granary, and grain therein, for the period of five years, from January 24, 1889, in which policy the insurance on said barn is

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stated at \$500, and the oats as grain at \$200, but the insurance of the granary to the amount of \$50, by mistake of the said defendant, was omitted in said policy."

Then follows a statement of the loss, etc., and facts showing the liability of the company.

The defendant below in its answer admitted the policy, but alleged that it contained the following provision: "If any assessment be not paid within thirty days after date of same, this certificate shall thereupon lapse and cease to be in force, and if remittance be received after date of such lapse no indemnity will be paid for any loss happening between the date of such expiration and receipt of such remittance; but the amount so received shall be placed to the credit of the member and he shall be reinstated and this certificate renewed;" that the said Wilder had failed and neglected to pay the following assessments, to-wit: March, 1889, \$1.28; June, 1889, \$1.60; September, 1889, \$1.60; and for that reason the said policy of insurance had lapsed and was null and void at the time and previous to the pretended loss by fire, and was not binding upon the said company at the time of the said loss, or at any time since the first assessment became due and owing. Also denies that it was indebted to the said plaintiff in the sum claimed or any other amount.

The plaintiff, for reply, admits the assessments and the amounts thereof, and the non-payments thereof, but said the same had been waived by the defendant company. The case was tried to the court, judgment for plaintiff, to reverse which this action is presented to this court.

On the trial of the cause the court stated the reasons for the judgment in its findings, viz.: "This cause came on for trial before the court upon the pleadings and evidence and was submitted on consideration. The court finds said policy should not be reformed; the court further finds that plaintiff, on December 29, 1888, made the application in writing, introduced in evidence, to defendant for insur-

ance of his granary, barn, and grain therein, described in petition, among other property in said application described, giving therefor his note for \$16, and premium contract for \$48, and that on January 10, 1889, defendant issued to plaintiff the policy introduced in evidence, insuring said granary and stable at \$500, and grain therein for \$200, for five years from January 24, 1889; that said property was totally destroyed by fire, without any fault or neglect of plaintiff, November 11, 1889, and that said property so destroyed was of the value of \$700 and covered by said policy at time of said loss; that plaintiff duly notified defendant of said loss and that no part of said loss has been paid; that three assessments were made on said premium contract of \$48, to wit, March, June, and September, 1889, respectively, and no part thereof was paid by plaintiff, and all were due at time of said loss; that after said loss plaintiff offered to pay the same, which defendant declined and refused to receive; that said policy provides that thirty days after date of notice of any assessment it shall lapse and cease to be in force; that last part of said application and contract of insurance provides as follows: 'This contract may be canceled at the request of the assured by paying all assessments up to date of such request, together with \$2 extra as a cancellation fee, and the surrender of membership certificate to the company. This company reserves the right to cancel this contract by giving notice of same and returning premium contract or pledge to member.'

"Court also finds that defendant never returned or offered to return to plaintiff his \$16 note and premium contract of \$48, or either of them, nor did said defendant cancel said policy or notify said plaintiff of any intention to do so. Court further finds defendant is entitled to a credit of \$——, principal and interest on the three assessments unpaid by plaintiff.

"From last clause in sec. 3, secs. 17, 18, and 42, ch.

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43, Statutes Nebraska; vol. 11, Encyclopædia of Law, p. 342; No. 7, p. 336, No. 2 and p. 308, No. 5, and in particular cases cited in said numbers or sections, 26 Ia., 10; 59 N. Y., 521; 34 N. W. Rep., 151; 18 Id., 749; 39 Wis., 120, last part of the case, 16 Neb., and cases cited on p. 406; 15 Id., 494; 18 Id., 501, the court do find in law the defendant's continuation to make assessments against plaintiff and notice to pay same, thereby recognized said policy and waived the forfeiture of the same, even if it lapsed by failure to pay said assessments, and continued it in force.

"The court further finds their retention of plaintiff's \$16 note and \$48 premium contract and making three assessments thereon, and notice to pay same, in law waived any lapse of said policy, and that their failure to return to plaintiff his said note and contract and cancel said policy, and notify plaintiff of the same, renders the defendant liable in this case.

"It is therefore ordered by the court that said policy be not reformed but remain in full force as issued, and it is also considered and adjudged that the said plaintiff have and recover of and from said defendant \$695, and his costs herein expended, taxed at \$——."

Section 17 of chap. 43, Comp. Stats. of 1887, is as follows: "All notes deposited with any mutual insurance company, at the time of its organization, as provided for in section 3 hereof, shall remain as security for all losses and claims, until the accumulation of the profits invested as required by the sixth section of this act shall equal the amount of cash capital required to be possessed by stock companies organized under this act, the liability of each note decreasing proportionately as the profits are accumulated; but any note which may have been deposited with any mutual insurance company subsequent to its organization, in addition to the cash premiums, or any insurance effected with such company may, at the expiration of the

time of such insurance, or upon the cancellation by the company of the policy, be relinquished and given up to the maker thereof, or his legal representatives, upon his paying his proportion of losses and expenses which may have accrued thereon during such term. The directors or trustees of any such company shall have the right to determine the amount of the note to be given, in addition to the cash premiums, by any person insured in such company, and every person effecting insurance in any mutual company, and also their heirs, executors, administrators, and assigns continuing to be so insured, shall thereby become members of said company during the period of insurance, and shall be bound to pay for losses and such necessary expense as aforesaid accruing to said company, in proportion to the amount of his or their deposit note or notes; *Provided*, That any person insured in any mutual company, except in the case of notes required by this act to be deposited at the time of its organization, may at any time return the policy of cancellation, and upon payment of the amount due at such time upon his premium note, shall be discharged from further liability thereon."

"Sec. 18. The directors shall, as often as they deem necessary, after receiving notice of any loss or damage, settle and determine the sums to be paid by the several members thereof, as their respective portions of such loss, and publish the same in such manner as they shall deem proper, or the by-laws shall have prescribed; but the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, and shall be paid to the officers of the company within thirty days after the publication of said notice; and if any member shall, for the space of thirty days after personal demand, or by letter, for payment shall have been made, neglect, or refuse to pay the sum assessed upon him as his proportion of any loss aforesaid, the directors may sue for and recover the whole amount of his deposit note or notes, with costs

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of suit ; but execution shall issue for assessments and costs as they accrue only, and every such execution shall be accompanied by a list of losses for which the assessment was made ; if the whole amount of deposit notes shall be insufficient to pay the loss occasioned, the sufferers insured by the said company shall receive, toward making good their respective losses, a proportionate share of the whole amount of said notes, according to the sums to them respectively insured, but no member shall ever be required to pay for any loss more than the whole amount of his deposit note or notes."

Section 3 requires the certificate of a justice of the peace, notary public, or clerk of the district court to accompany each note received from a person insured, certifying that in the opinion of such officer the person making the same is pecuniarily good and responsible for the same in property not exempt from execution by the laws of the state, etc.

By section 18, where an assessment has been made and is not paid to the officers of the company within thirty days after the publication of notice, and after thirty days from personal demand or by letter, neglect, or refuse to pay his assessment, the company may sue for and recover the whole amount of his deposit note with costs of suit, and executions shall thereupon be issued on said judgment from time to time as assessments are made for losses. That is the mode provided by law for collecting delinquent assessments and should have been followed in this instance. In addition to this no forfeiture was declared and the company treated the contract as continuing. Upon the whole case the judgment is supported by the clear weight of evidence and is

AFFIRMED.

THE other judges concur.

STATE BANK OF WILCOX V. F. G. WILKIE.

[FILED NOVEMBER 2, 1892.]

1. **Negotiable Instruments: ACTION ON DRAFT: PROOF OF ACCEPTANCE.** An action was brought upon two drafts which it was claimed one W. had accepted. This he denied. The proof tended to show that the alleged acceptance had been obtained, if at all, January 14, 1890, about 7 P. M., by one H., a stranger; that W. had then signed a property statement for an alleged hydro-carbon burner, which H. professed to be about to furnish to him. W. also signed two contracts. He denied that the signatures to the acceptance were his, and the jury having found that he did not sign the same, *held*, that the verdict conformed to the proof.
2. ———: ———: **BONA FIDE PURCHASERS: EVIDENCE.** On the night of January 14, 1890, H., a stranger, took the alleged drafts above described and indorsed the same and delivered them in the night season to one Wheeler, and thereupon left the county. Wheeler soon after, 9 A. M. next morning, took the drafts to a bank and had them discounted for four-fifths of their face value. The alleged acceptor lived less than three miles from the bank and apparently was solvent, yet no inquiry was made of him, nor any one having knowledge of the matter in regard to the drafts. *Held*, That these facts were proper to be submitted to the jury in determining the question of good faith of the purchaser.

ERROR to the district court for Phelps county. Tried below before GASLIN, J.

C. C. Flansburg, for plaintiff in error.

S. A. Dravo, Leese & Stewart, and *Dilworth, Smith & Dilworth*, contra.

MAXWELL, CH. J.

The causes of action are set forth in this case as follows :
“Plaintiff states that it is a corporation duly organized under the laws of Nebraska. Its first cause of action is

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founded upon a written instrument made and executed by defendant in the words and figures following:

“‘ WILCOX, NEB., January 14, 1890.

“‘June 1st after date pay to the order of Thomas Hall \$500 with exchange, and eight per cent interest from date if not paid when due. Value received and charge to the account of

HALL & Co.,

“‘By THOS. E. HALL.

“‘To F. G. Wilkie, Wilcox, Nebraska.’

“‘That on the back of said instrument appeared the following indorsement:

“‘To indemnify on acceptance I hereby certify that I own in my own name 320 acres of land in sections 26 and 35, T. 5, R. 17, county of Phelps and state of Nebraska, worth \$8,000 above incumbrance; personal property, chattels, and merchandise, \$3,000 above incumbrance.

“‘Dated Wilcox, Neb., January 14, 1890.

“‘F. G. WILKIE.

“‘THOS. E. HALL.

“‘H. H. WHEELER.’

“‘That on the 14th day of January, 1890, said Thomas E. Hall indorsed his name thereon and sold the same for a valuable consideration to H. H. Wheeler, who, on the 15th day of January, 1890, indorsed his name on the back of said instrument and sold the same to the plaintiff herein for a valuable consideration, and plaintiff is now the owner and holder thereof.

“‘That no part thereof has been paid, and there will be due on the said instrument from said defendant to plaintiff on the 1st day of June, 1890, the sum of \$500.

“‘Second cause of action:

“‘That on the said 14th day of January, 1890, the said defendant made, executed, and delivered his certain instrument in writing, in words and figures following:

“‘ WILCOX, NEB., January 14, 1890.

“‘October 1st after date pay to the order of Thomas E.

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Hall \$500 with exchange, and eight per cent interest from date if not paid when due. Value received, and charge to the account of

HALL & Co.

“By THOS. E. HALL.

“‘To F. G. Wilkie, Wilcox, Neb.’

“That on the back of said instrument appeared the following indorsement:

“‘To indemnify on acceptance I hereby certify that I own in my own name 320 acres of land in sections 26 and 34, T. 5, R. 17, county of Phelps and state of Nebraska, worth \$8,000 above incumbrance; personal property, chattels, and merchandise, \$3,000 above incumbrance.

“‘Dated Wilcox, Neb., January 14, 1890.

“‘F. G. WILKIE.

“‘THOS. E. HALL.

“‘H. H. WHEELER.’

“That no part of said instrument or the amount therein expressed has been paid, and there will be due thereon from said defendant to plaintiff on the 1st day of October, 1890, the sum of \$500; plaintiff having purchased the same for a valuable consideration of the said H. H. Wheeler on January 15, 1890, or in the usual course of business, without any notice of any defense, and said H. H. Wheeler purchased said instrument of said Thomas E. Hall on the 15th day of January, 1890, for a valuable consideration.

“Plaintiff therefore prays for a judgment against said defendant for the amounts and at the times in his petition set out, and for such other relief as may be just in the premises.”

The answer is a general denial.

On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The principal objection is that the verdict is against the weight of evidence. The testimony tends to show that the defendant resides from two and a half to three miles from Wilcox; that about 7 P. M. on the 14th of January, 1890,

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a person calling himself Thomas E. Hall went to the defendant's residence and made some arrangement to furnish him an alleged carbon hydrogen burner, and apparently pretended to employ him as agent in that locality for the alleged burner.

The issues being restricted the exact nature of the contract does not appear, but this much is clear that Hall was to furnish one or more alleged burners to the defendant, and required a property statement, which the defendant made as follows:

"To indemnify on acceptance I hereby certify that I own in my own name 320 acres of land in sections 26 and 34, Tp. 5, R. 17, county of Phelps and state of Nebraska, worth \$8,000 above incumbrance; personal property, chattels and merchandise, \$3,000 above incumbrance.

"Dated Wilcox, Neb., January 14, 1890.

"F. G. WILKIE."

On the other side is a draft in regular form, apparently filled out and signed by Hall by using an indelible pencil, while Wilkie's name purports to have been signed in ink. Wilkie denies the acceptance absolutely.

The proof tends to show that he owed Hall nothing and hence had no occasion to give him one or more drafts; that Hall came to Wilcox on the night of the 14th of January, 1890, after leaving the residence of the defendant, and called upon one Wheeler, the agent at Wilcox of the K. C. & O. R. R. It does not appear whether there had been any previous arrangement between these parties or not, but Wheeler very readily made an arrangement with Hall by which the drafts were indorsed by Hall that night and delivered to Wheeler.

In the morning, almost immediately after the bank opened, Wheeler went to the bank and offered to sell the drafts for a large discount. The drawer was a stranger, comparatively unknown to the bank or any of its officers. The alleged acceptor seems to have been possessed of con-

siderable property, so that the drafts if genuine were worth their face, yet these were alleged to have been bought of Wheeler after a few minutes', not to exceed twenty minutes, conversation, for the sum of \$800, without inquiry of the alleged acceptor.

It is very evident from the testimony that the man traveling under the name of Hall is engaged in disreputable business, worse, if possible, than larceny, and one who purchases paper from such a person under suspicious circumstances, need not be surprised if he finds that the man who has no scruples as to the means he uses to obtain a signature to a paper which afterwards turns up as a negotiable instrument, will have no compunctions of conscience to prevent his tracing or otherwise copying the name thus obtained.

The proper place for men of the Hall order is the penitentiary, and the proper prosecuting officers should see that the law is enforced.

The testimony fails to establish the acceptance by the defendant, and also good faith on the part of the plaintiff in error. No objection is made to the instructions. The judgment is right and is

AFFIRMED.

THE other judges concur.

E. A. WEDGWOOD, SHERIFF, v. A. B. WITHERS ET AL.

[FILED NOVEMBER 2, 1892.]

Replevin: THE EVIDENCE in this case examined and considered, and *held* insufficient to support the verdict of the jury.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Thummel & Platt, Abbott & Caldwell, and A. W. Agee,
for plaintiff in error.

Thompson Bros., and Montgomery & Montgomery, contra.

NORVAL, J.

This suit was instituted in the court below by the defendants in error to recover the possession of a stock of dry goods, boots, shoes, hats, caps, and other merchandise, which had been seized by the plaintiff in error, as sheriff of Hall county, to satisfy certain executions issued upon judgments rendered against Jesse H. Withers and Gustavus Kolls. There was a trial to a jury, with verdict and judgment in favor of plaintiffs below.

But a single question is presented for our consideration, and that is: Does the evidence sustain the verdict? It is insisted that the goods levied upon by the sheriff, which are in controversy in this action, were purchased by, and belonged to, the defendants in error. It is undisputed that on the 16th day of February, 1889, the said Jesse H. Withers and Gustavus Kolls were engaged in the mercantile business in Grand Island under the firm name and style of Withers & Kolls, and were then indebted to wholesale houses and others in sums aggregating more than \$18,000. On said date their stock of goods, which was covered by insurance, was destroyed by fire. Shortly thereafter they made settlement with the insurance companies, and received over \$13,000 in cash. Subsequent to the loss, but prior to its adjustment, they wrote to their creditors saying that they would pay as soon as the insurance companies adjusted their loss; but as soon as they had effected a settlement with the insurance companies and received the money from them, so that it was beyond the reach of creditors, they sent to their various creditors a proposition offering to pay fifty cents on the dollar of their indebtedness, in full settlement. Some of the creditors

accepted the proposition, while others commenced attachment proceedings, and others still obtained judgments on their claims and had executions issued. To the creditors who declined to accept the terms of settlement proposed, they have refused to pay anything.

It also appears that said Jesse H. Withers and Gustavus Kolls on April 10, 1889, procured their wives, the defendants in error, to file a certificate of copartnership. A new stock of goods was purchased, and on the 20th day of the same month business was resumed at the old stand under the old firm name of Withers & Kolls. The husbands had exclusive control and management thereof the same as before the fire. They took goods from the store for their own use without charging themselves therewith. They did not keep any account of the moneys which were taken from the store and used by either of them, nor have they ever rendered an account of the business to their wives. The defendants in error had no money, yet the record shows several hundred dollars were paid in cash on the goods at the time the same were purchased. A pertinent inquiry—who furnished the money? The proofs disclose that of the \$13,000 received from the insurance companies only about \$9,000 was paid to the creditors of the old firm of Withers & Kolls, and the remaining \$4,000 they failed to account for, although repeatedly requested so to do when upon the witness stand. A fair inference from the testimony is that the first cash payment on the goods was made out of moneys received from the insurance companies, and all others were made from the proceeds of the sale of goods or moneys borrowed. It is certain that the first payment on the stock was not derived from the \$2,500 borrowed from one of the banks in Grand Island, as claimed by defendants in error, for the reason the same was paid several days prior to the making of the loan. As to this loan, it was negotiated by Jesse H. Withers and Gustavus Kolls, each signing his wife's name to the note given therefor.

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It is suggested that the payment of the goods, which were purchased on credit after the fire, was secured by mortgage on the separate properties of the wives. While it is true for the purpose of obtaining goods on credit from Kerkendall, Jones & Co., and Samuel C. Davis, a mortgage was given upon two pieces of real estate in Grand Island to Charles A. Coe as trustee for said parties, yet the evidence is undisputed that on and prior to December 24, 1887, one of these tracts belonged to Jesse H. Withers, and the other was owned by Gustavus Kolls; that Withers, without any consideration therefor, made a deed to his tract directly to his wife, which deed purports to have been executed on December 24, 1887, and a deed bearing the same date was executed by Kolls, without consideration, for the premises belonging to him, to Mrs. Kolls. Neither of these conveyances was placed upon record until after the fire and about the time the alleged new partnership was formed. While the real estate thus conveyed was exempt, and not subject to fraudulent alienation, the same being the homesteads of the parties, the proofs satisfy us that the placing of these transfers upon record and the making of the mortgage to Coe were parts of the scheme devised by the husbands to enable them to resume business in the name of their wives, without paying the creditors of the old firm of Withers & Kolls who had declined to compromise their claims for fifty cents on the dollar. After a careful consideration of the evidence we have reached the conclusion that it fails to support the finding of the jury. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

MARY H. RUPERT ET AL. V. PETER PENNER ET AL.

[FILED NOVEMBER 2, 1892.]

1. **Ejectment: ADMISSION OF EVIDENCE: DISCRETION OF TRIAL COURT.** Permitting the introduction in evidence of records of deeds duly recorded, for the purpose of proving title to real estate in an action in ejectment, instead of requiring the production of the original deeds, rests largely in the discretion of the trial court, and its ruling thereon will be regarded as conclusive unless there has been an abuse of discretion.
2. ———: ———: **SUFFICIENCY OF OBJECTION.** The admission of a deed in evidence was objected to at the time by the adverse party as incompetent, immaterial, and irrelevant. *Held*, That the objection was not specific enough to reach defects in the execution of the instrument, as that it was not witnessed.
3. **Evidence: OBJECTIONS: WAIVER.** Ordinarily objections to the admission of testimony not made when offered are waived and cannot be urged for the first time on appeal to this court.
4. **Deed: DESCRIPTION OF REAL ESTATE.** Real estate is sufficiently described in a conveyance when the deed refers for identification to another deed specifically mentioned therein, which contains an accurate description of the property sold.
5. ———: **IDENTITY OF GRANTOR.** In the body of a deed and in the certificate of acknowledgment the grantor was correctly described as Archibald T. Finn. The deed was signed as Arch. T. Finn. The certificate of acknowledgment identified the party mentioned as grantor as known to the officer to be the person whose name is affixed to the instrument and who executed the same. *Held*, That it sufficiently appeared that "Archibald T." and "Arch. T." were one and the same person.
6. ———: **IDENTITY OF THE NAME of a grantor or grantee is *prima facie* evidence of identity of the person.**
7. **Conveyance of Real Estate: CONSTRUCTION OF INSTRUMENT.** Under the provisions of section 53, chapter 73, Compiled Statutes, in construing an instrument conveying real estate, when by any reasonable interpretation the granting clause and the *habendum* can be reconciled, effect must be given both.
8. ———: ———. The premises of a deed were, "do hereby grant, sell and convey unto J. P. C." The *habendum* clause was "to have

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| 35 | 587 |
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| 35 | 587 |
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| 35 | 587 |
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| 60 | 177 |

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| 35 | 587 |
| 61 | 660 |

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and to hold said premises with the appurtenances unto the said J. P. C. for and during the term of his natural life, and at his decease the same shall descend in equal shares to his children," naming them. *Held*, That the deed conveyed a life estate to J. P. C. with remainder to his children therein mentioned.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Savage, Morris & Davis, for plaintiffs in error.

Mahoney, Minahan & Smyth, contra.

NORVAL, J.

This is a suit in ejectment brought in the court below by Mary H. Rupert, Sarah A. Burchmore, Thomas B. Cleveland, Sophia Cleveland, John B. Cleveland, Clara H. Cleveland, Grace M. Cleveland, and Grant W. Cleveland, the plaintiffs in error, to recover certain real estate situated in the city of Omaha.

A jury was selected to try the cause, but, after the testimony was closed, by agreement of parties the question of title was submitted to the court, who found for the defendants, and judgment was entered dismissing the action.

Plaintiffs claim title from the United States through numerous conveyances, the following being their chain of title to the premises: United States to Preston Reeves, patent, dated May 1, 1860, recorded January 5, 1861; Preston Reeves and wife to Jesse Lowe, mayor of the city of Omaha, warranty deed, dated October 31, 1857, recorded November 2, 1857; Jesse Lowe, mayor, etc., to Thomas B. Cuming, deed, conveying the undivided one-half of the premises, dated October 31, 1857, recorded November 2, 1857; Charlotte Cuming, widow of Frank H. Cuming, deceased, May Cuming, Francis Cuming, Anne Cuming, Emily Cuming, and Caroline Large, sisters of said Thomas B. Cuming, to Margaretta C. Cuming, quitclaim deed,

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dated August 22, 1864, recorded December 2, 1864; Jesse Lowe, mayor, etc., to Archibald T. Finn and Charles Bridge, deed to undivided one-half, dated October 31, 1857, recorded November 2, 1857; Charles Bridge to Archibald T. Finn, deed, dated April 29, 1861, recorded May 14, 1861; Margaretta C. Cuming to George Armstrong, deed, dated December 1, 1864, recorded December 2, 1864; Archibald T. Finn to George Armstrong, deed, dated September 27, 1862, recorded December 6, 1864; George Armstrong to Mason L. Derwin, deed, dated September 19, 1872, recorded same date; Mason L. Derwin to Moses Hotaling, warranty deed, dated December 14, 1867, recorded December 20, 1867; warranty deed from Moses Hotaling and Ellen M., his wife, to John P. Cleveland for life, with remainder to his children, the plaintiffs herein, bearing date September 13, 1877, and filed for record the next day.

It appears from the evidence that said John P. Cleveland died in 1886, and that Mary H. Cleveland and Sarah A. Cleveland, mentioned in the deed last referred to, have since married, the former to Louis Rupert, and the latter to one Burchmore.

The record shows that John P. Cleveland and wife mortgaged the premises sought to be recovered in this action on the 8th day of January, 1880, to Charles C. Housel to secure the payment of \$150; that subsequently said mortgage was foreclosed, the property sold under the decree to said Housel, and, by direction of the court, Wallace R. Bartlett, as special master commissioner, executed a deed to Housel covering said premises. On the 5th day of November, 1883, said Charles C. Housel, with his wife, Myra J., executed and delivered a warranty deed of the property to the defendant, Peter Penner, which was duly placed upon record.

Numerous objections are urged by defendants to certain deeds in plaintiffs' chain of title, and defendants further in-

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sist that the deed of Moses Hotaling and wife conveyed the fee to John P. Cleveland, instead of a life estate to him, with remainder to plaintiffs.

The plaintiffs, for the purpose of showing the devolution of title, introduced in evidence, over defendants' objections, record copies of the deeds, instead of the originals. Defendants contend with much earnestness that the proper foundation for the introduction of secondary evidence of the conveyances was not laid, and, although the records were admitted, the trial court ought to have excluded the same in reaching a conclusion, and therefore it will be presumed to have done so.

Section 13 of chapter 73 of the Compiled Statutes of 1891, among other things, provides that "the record of a deed duly recorded, or a transcript thereof duly certified, may also be read in evidence with the like force and effect as the original deed, whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control."

It appears from the testimony of Mrs. Cleveland that she was the wife of John P. Cleveland and was residing with him at the time of his death; that he kept his papers in his desk at his home, where she made diligent search for the deeds, but was unable to find either of them, and that none of the original deeds constituting plaintiffs' chain of title were in her possession or under her control. True, Mrs. Cleveland is not a party plaintiff in her own right, yet she is the natural guardian of and appears and prosecutes the suit as the next friend for the minor plaintiffs.

In view of the statutory provisions and the construction placed thereon by this court, we are of the opinion that sufficient foundation was laid for the introduction of the record of conveyances. The question of admitting in evidence records of deeds and other instruments duly recorded, instead of requiring the production of originals, rests largely in the discretion of the trial court. There was no

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abuse of discretion in this case in admitting secondary evidence. The deed to John P. Cleveland and the plaintiffs embraces only a portion of the lands described in the deeds to which objections are made; therefore, the record of such deeds was admissible in evidence without laying any foundation therefor, as there is no presumption that the originals were ever in plaintiffs' possession. (*Delaney v. Errickson*, 10 Neb., 492; *Hapgood Plow Co. v. Martin*, 16 Id., 27; *F., E. & M. V. R. Co. v. Marley*, 25 Id., 138; *Buck v. Gage*, 27 Id., 306.)

The point is made that the deed from Jesse Lowe, mayor, to Finn and Bridge was incompetent to show a transfer of title from the grantor to the grantees therein named, because the same is not witnessed; therefore it should not have been admitted by the trial court, and hence must now be disregarded. A sufficient answer to this contention is that no such objection was urged in the court below. The record shows that when the deed, or rather the record thereof, was offered in evidence the defendants objected to its introduction, as being incompetent, immaterial, and irrelevant. This objection is too general to reach the defect now insisted upon. (*Gregory v. Langdon*, 11 Neb., 166.) Had the ground of the defendants' objection to the deed been that it was not witnessed, its admission in evidence would have been improper. While this is true, it by no means follows that, since the deed was admitted without such objection being made, the court would be justified in rejecting the same when it comes to weigh the testimony.

The cases of *Enyeart v. Davis*, 17 Neb., 228, and *Willard v. Foster*, 24 Id., 213, cited in brief of defendants, are inapplicable. No such a question as we are now considering was therein decided. These decisions affirm the doctrine, which has been repeatedly recognized and applied by this court, that error will not lie for the admission of irrelevant testimony in a cause tried to a court without a jury. The reason for the rule is well stated in *Willard v.*

Foster, thus: "The court must necessarily have an opportunity to examine each article of evidence offered, even for the purpose of rejecting it; and so the duty of acting and deciding the cause, upon the legal and relevant evidence selected from the mass that may have been introduced, may be as well discharged by the court upon the final consideration of the cause, as to pause in the course of trial to pass upon the admissibility of the several matters offered in evidence." In causes tried without the intervention of a jury, the court must base its decision solely upon the material and relevant testimony, and as the court is presumed to have considered none other, the admission of irrelevant testimony could not prejudice the party complaining of its introduction. But neither of the cases cited by counsel is authority for holding that a court, after admitting relevant and material testimony, may disregard the same because it was inadmissible, for the reason no foundation had been laid, or because of some other ground which properly might have been made, but which was not urged. No good reason has been suggested why the rule for which defendants contend should be adopted. It certainly would not aid in the administration of justice. Under such a rule, objections to testimony would be unnecessary, but the court would be compelled to regard all objections which could properly be made, but which were not insisted upon when the testimony was received. Ordinarily, in a case tried to a jury, objections not made to testimony when offered are waived, and we think the same rule should obtain where the trial is to the court.

The deed from Reeves to Lowe shows that the conveyance was made to the grantee as mayor of Omaha, and to his successors in office, in trust to convey the tract therein described, which includes the premises involved in this lawsuit, to the several owners and occupants. It is objected that it is not shown that Finn and Bridge were beneficiaries under the trust, therefore the deed from Lowe to them

was not competent. The legal presumption, in the absence of any evidence upon the subject, is that Finn and Bridge were entitled to the deed under the terms of the trust, and that the trust was properly executed. (*Tecumseh Town Site Case*, 3 Neb., 267.)

It is urged that the deed from Bridge to Finn is void for want of certainty in the description therein contained, which reads: "All and singular that certain piece or parcel of land situated and being within the corporate limits of the city of Omaha, in the county of Douglas, and territory of Nebraska, it being an undivided quarter section, number sixteen (16), known and designated on Byers' map of the city of Omaha as Bridge and Cummings tract, the said land is the same as conveyed by deed to Archibald T. Finn and Charles Bridge, now on record in the recorder's office in the city of Omaha, containing forty acres, more or less." The precise quarter of section 16 intended to be conveyed is not stated, nor is the township and range mentioned; therefore the description is so defective and imperfect that nothing passed by that alone; yet the location of the property is definitely fixed and made certain by that part of the deed which refers to Byers' map of the city of Omaha and to the deed to Finn and Bridge. The deed from Bridge to Finn identifies the property as being the same as is designated in the Byers map as Bridge and Cummings tract, and as the same land conveyed by the deed to Archibald T. Finn and Charles Bridge, then on record, in which the property is described as the "undivided one-half of the southeast quarter of section sixteen (16), in township number fifteen (15) north, of range thirteen east, of the 6th principal meridian." Taking these two deeds together there is no uncertainty as to the property intended to be conveyed. (*Caldwell v. Center*, 30 Cal., 539; *Coats v. Taft*, 12 Wis., 389*; *Newman v. Tymeson*, 13 Wis., 172; *Nelson v. Broadhack*, 44 Mo., 596.)

But even if the property was not sufficiently identified,

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the judgment could not stand. Independent of the conveyance from Bridge to Finn, the latter was the owner of the undivided fourth of the tract in dispute by virtue of the deed from Lowe to Finn and Bridge, and if plaintiffs only obtained title to the undivided one-fourth, they would still be entitled to maintain the action.

It is insisted that the record does not show that Archibald T. Finn has ever parted with his title. This contention is based upon the fact that in the body of the deed from Finn to George Armstrong, the grantor is designated as Archibald T. Finn, while the signature to the conveyance is Arch. T. Finn. In the certificate of acknowledgment the name of the grantor is written the same as in the body of the deed, the officer taking the acknowledgment certifying that "personally came Archibald T. Finn, personally to me known to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the instrument to be his voluntary act and deed." This was sufficient to show that the grantor described in the deed and the person who signed and acknowledged the instrument were one and the same person. It is obvious that Arch. was intended as an abbreviation of Archibald, therefore there is no contradiction between the certificate of acknowledgment and the deed. It frequently occurs in transferring lands that the grantor in making a deed signs either his initials or the abbreviation of his given name, although the Christian name is stated in full, both in the body of the deed and in the certificate of acknowledgment, yet the instrument would not be inadmissible in evidence for that reason alone, where from an examination thereof it clearly appears that the same was signed and acknowledged by the grantor. This doctrine is well supported by the adjudicated cases.

In *Lyon v. Kain*, 36 Ill., 362, the grantors were correctly described in the body of the conveyance and in the acknowledgment as Samuel B. Postley and Abraham

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B. Kain, while the deed was signed "S. Brook Postley" and "A. Boudoin Kain." It was held that as the officer taking the acknowledgment certified that he knew them to be the identical persons named in the deed as makers thereof, the identity of the grantors with the persons signing was sufficiently established to entitle the instrument to be received in evidence without other proof. Walker, C. J., in delivering the opinion of the court, observes: "When it is remembered that the law requires the officer to be personally acquainted with the grantor, or to have his identity proved, before he receives the acknowledgment, we can perceive no irregularity in the execution of this conveyance. The identity of the grantor, and not the person who merely signs the deed, must be established before the officer can act. His identity is a fact that the officer must know, or have proved, before he is authorized to grant his certificate, and when he has found and certified that fact, it is binding until rebutted. There is no evidence in this record attacking the truth of these certificates, and they must in this particular be held sufficient. The party executing any instrument may adopt any name, and he will be bound by its execution. If not his real name, his identity with the execution must be proved, and we think it has been done in this case."

In *Grand Tower Mfg. Co. v. Gill*, 111 Ill., 541, one of the grantors was named in the body of the conveyance as well as in the certificate of acknowledgment as "Robert P. McClintock," but the deed was signed "R. Parker McClintock." It was ruled that as the certificate of acknowledgment showed that Robert P. McClintock acknowledged the instrument, it sufficiently appeared that "Robert P." and "R. Parker" were the same person and that the instrument was properly received in evidence. In this connection we also refer to the following cases cited in the brief of plaintiffs: *Fenton v. Perkins*, 3 Mo., 106; *Houx v. Batteen*, 68 Id., 87; *Middleton v. Findla*, 25 Cal., 76.

None of the cases cited in brief of defendants conflict with the proposition above stated. The one nearest holding a contrary doctrine is *Boothroyd v. Engles*, 23 Mich., 21; but a cursory examination shows that it is not really an authority on the question under consideration. In that case Hiram Sherman was named as grantor in the body of the deed and in the acknowledgment, while the instrument was signed Harmon Sherman. It was held that the defect was not supplied by the certificate of acknowledgment and the deed was excluded. Hiram and Harmon are not similar, nor is one the abbreviation of the other. The decision therefore is not in point.

Another case cited by defendants is *Burford v. McCue*, 53 Pa. St., 431. There R. P. O'Neill was described as grantor in the deed, and the acknowledgment and conveyance were so signed. It was ruled that the deed was not admissible in evidence to show a conveyance from Patrick O'Neill without evidence of identity, and that without such proof it would not be presumed that R. P. O'Neill stood for Rev. Patrick O'Neill. In the case at bar the certificate of the officer who took the acknowledgment, established that the grantor described in the deed is the same person who signed and acknowledged the same. Parol proof of identity was therefore unnecessary.

We have no doubt that the deed from Finn to George Armstrong vested in the latter the title to the undivided one-half of the property in dispute. As to the other undivided one-half, the record shows that it was conveyed by Jesse Lowe, mayor, to one Thomas B. Cuming; that said Thomas B. Cuming died in February or March, 1858, intestate without issue, leaving him surviving, his widow, Margaretta C. Cuming, his father, Frank H. Cuming, and his sisters, Mrs. Large, Mary Cuming, Charlotte Cuming, Frank Cuming, Emily Cuming, and Anna Cuming. It is conceded that, under the law of descent in force at the time of the death of Thomas

B. Cuming, his undivided one-half of the real estate descended to his widow, Margaretta C. Cuming, for life, with remainder to his father, Frank H. The record discloses that the said Frank H. died in 1862, and that his widow and children on the 22d day of August, 1864, executed the deed to said Margaretta C. Cuming, to which reference has been made. The widow of Thomas B. Cuming not only acquired by descent a life estate in the property, but also the remainder by purchase, if the above mentioned deed bearing date August 22, 1864, conveyed to the grantee therein the interest which descended to the father of Thomas B. Cuming. Numerous objections are urged against this deed, but in our view it is not important for the purpose of this hearing that we should stop and determine whether the same are well founded or not, for it is conceded by both parties that Margaretta C. Cuming, the widow of Thomas B. Cuming, deceased, who owned a half interest in the property at the time of his death, is still living, and as the property went to her during her life, she is still entitled to possession unless she has conveyed her interest, in which case, the person owning such interest is entitled to possession while she lives.

But it is urged by defendants that there is no evidence that Margaretta C. Cuming has parted with her interest. This contention is not borne out by the record, for, as already stated, Margaretta C. Cuming conveyed the property on December 1, 1864, to George Armstrong. A similar objection is urged against this conveyance as was made to the deed from Finn to Armstrong, which we have already discussed; and for the reasons there stated the objection to the validity of this deed must be overruled. It is signed M. C. Cuming, but in the body of the deed and the acknowledgment the grantee and the person executing the instrument is described as Margaretta C. Cuming. This was sufficient *prima facie* to establish that M. C. and

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Margaretta C. are one and the same, and there is no evidence in the record to the contrary.

It is said there is nothing in the deed to identify the grantor with Margaretta C. Cuming, the widow of Thomas B. Cuming. The failure to recite such fact in the deed does not invalidate the conveyance. Identity of the name is sufficient to make a *prima facie* case of identity of the person. (2 Phillips, Ev., 508; Maxwell, Pl. & Pr., 612; *Aultman v. Timm*, 93 Ind., 158; *Stebbins v. Duncan*, 108 U. S., 47; *Douglas v. Dakin*, 46 Cal., 49; *Flournoy v. Warden*, 17 Mo., 436.) It follows that the life estate of the widow of Thomas B. Cuming vested in George Armstrong, who conveyed the same, with the half interest obtained from Finn, to Mason L. Derwin, and from him the title passed down through Moses Hotaling to John P. Cleveland or the plaintiffs. If the latter acquired such title under said deed, then they are entitled to the possession of the premises. The determination of this question necessitates a construction of the following provisions of the deed executed by Hotaling and wife:

“Know all men by these presents, that we, Moses Hotaling and Ellen M., his wife, of Washington county, Neb., for the consideration of one hundred dollars, in hand paid, do hereby grant; sell, and convey unto John P. Cleveland, of Omaha, Nebraska, the following described real estate in the county of Douglas, state of Nebraska, and bounded and described as follows:

* * * * *

“Together with all the hereditaments and appurtenances to the same belonging. To have and to hold said premises, with the appurtenances, unto the said John P. Cleveland for and during the term of his natural life, and at his decease the same shall descend in equal shares to his children, Mary H. Cleveland, Sarah A. Cleveland, Thomas B. Cleveland, Sophia Cleveland, John F. Cleveland, Clara H. Cleveland, Grace M. Cleveland, and Grant W. Cleve-

land, and to their heirs and assigns. And I, the said Moses Hotaling, for myself and my heirs, executors, and administrators, do hereby covenant with the said John P. Cleveland and his heirs and assigns that I am lawfully seized of said premises; that they are free from incumbrance, except the taxes aforesaid; that I have good right to sell the same, and that I will, and my heirs, executors, and administrators shall, warrant and defend the same against the lawful claims and demands of all persons whomsoever."

The defendants contend the above deed conveyed to John P. Cleveland an estate in fee-simple, while plaintiffs, on the contrary, insist that he took only a life estate with remainder to his children named in the deed, who are the plaintiffs herein. If it were not for the limitation contained in the *habendum* clause, the contention of defendants would be unanswerable, for under our statute the use of the word heirs in a deed is not indispensable to the conveyance of a fee. In this respect the legislature has changed the common law rule. Where no estate is expressly mentioned in the granting clause or premises of a deed it will be presumed that all the interest of the grantor passed by the conveyance, unless a contrary intent is clearly manifest from the language of the entire instrument.

Counsel for defendants claim that the *habendum* contradicts the granting clause, and they invoke the familiar doctrine that when the *habendum* in a deed is repugnant to the limitations appearing in the premises, it will not control the terms of the premises. We do not think this rule is applicable to the construction of the instrument under consideration, for the reason that the premises and the *habendum* are not contradictory. No definite estate is mentioned in the former, while the latter describes what estate in the property is conveyed. Such being the case, effect should be given to the limitations contained in the *habendum*. This is in harmony with the provision of section 53, chap-

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ter 73, Compiled Statutes, which provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

Under the above provision, in construing an instrument conveying real estate, when by any reasonable interpretation the granting or conveying clause and the *habendum* can be reconciled, effect must be given both. Applying this rule to the construction of this deed it is manifest from the language used that it was the intention of the grantor to convey only a life estate to John P. Cleveland. Argument could not make it plainer. Why specify that John P. Cleveland should have and hold the premises for and during the term of his natural life, "and at his decease the same shall descend in equal shares to his children," naming them, if it was the intention of the parties that he should take an estate in fee-simple? Clearly the purpose in using this language was to limit the estate conveyed to Mr. Cleveland to a life estate.

A case precisely in point, decided under a statute similar to ours, is *Riggin v. Love*, 72 Ill., 553, in which the conveyancing clause of the deed granted, bargained, sold, and conveyed to Eliza McGilton certain described real estate. The *habendum* clause, "to have and to hold the said above granted premises to the said Eliza McGilton during her natural life, and at her death the same is by these presents conveyed and confirmed absolutely unto her husband, Andrew McGilton; * * * and in case of the death of him, the said husband, Andrew McGilton, before that of her, the said Eliza McGilton, then by these presents the said afore described real estate is conveyed and confirmed absolutely unto the heirs at law of him, the

said Andrew McGilton, subject only to the lawful claims of her, the said Eliza McGilton." It was held that there was no repugnancy between the granting clause and the *habendum*, and that the deed conveyed a life estate to Eliza McGilton, with remainder in fee-simple to Andrew McGilton. See the following cases cited in plaintiffs' brief: *Tyler v. Moore*, 17 Atl. Rep. [Pa.], 217; *Montgomery v. Surdivant*, 14 Cal., 290; *Bodine v. Arthur*, 14 S. W. Rep. [Ky.], 904; *Bean v. Kenmuir*, 86 Mo., 666; *Watters v. Bredin*, 70 Pa. St., 237.

It is claimed that the word "children" used in the deed should be interpreted as a word of limitation and not a word of purchase; in other words, it should be construed to mean heirs, and, if so construed, Cleveland took a fee-simple title. While the word "children" is sometimes held to mean heirs, such a construction is not permissible here, for the reason that certain specified children of John P. Cleveland are named in the deed as the persons to whom the title should pass, thus clearly excluding the inference that it was the purpose of the parties that the property should go to the persons who might be his heirs at his death. We think the word "children," in the connection in which it is used, is merely descriptive, being employed for the purpose of identifying the particular persons named in the deed as remainder-men.

We think counsel for defendants attach too much importance to the word "deceased," mentioned in the *habendum* clause of the deed. To give the word, in the connection it is employed, its ordinary legal meaning would be to reject and disregard other parts of the sentence in which it is found, and ignore the intention of the parties as gathered from the entire instrument. We cannot believe it was used to denote that the children of John P. Cleveland were to take by inheritance and not as purchasers. Had such been the intention of the grantor, it is not reasonable to suppose the names of those who were to acquire the es-

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tate on the death of John P. Cleveland, would have been mentioned, for at that time they might not be living, and other children might have been born to him after the making of the deed, who might be heirs at his death. (*Dennett v. Dennett*, 40 N. H., 498; *Ballentine v. Wood*, 42 N. J. Eq., 558; *Halstead v. Hall*, 60 Md., 213; *Hodges v. Fleetwood*, 102 N. Car., 122; *Tyler v. Moore*, 17 Atl. Rep. [Pa.], 216.)

Our conclusion is that only a life estate vested in John P. Cleveland, which passed by the mortgage foreclosure proceedings to Housel, and by conveyance from him to the defendant Penner. This brings us to the consideration of the question whether or not the said John P. Cleveland is dead. If alive, plaintiffs would not be entitled to the possession of the property until after his death. Mrs. S. S. Cleveland, who was sworn on the part of the plaintiffs, testified on that branch of the case as follows:

Q. You were the wife of John P. Cleveland, were you not?

A. Yes, sir.

Q. Is he living?

A. No, sir.

Q. When did he die?

A. Three years ago.

Q. Where did he die?

A. At Kansas City.

Q. You were living with him at the time?

A. Yes, sir.

* * * * *

Cross-examination :

Q. You say Mr. Cleveland died in 1886?

A. Yes, sir; three years ago.

* * * * *

The witness further testified that plaintiffs are her children; that after the death of her husband she made an

ineffectual search in the place where he usually kept his papers for the deeds to the property in controversy.

The objection that the death of John P. Cleveland, who took the life estate, is not proven, is technical, and without merit. It is based upon the fact that in the question propounded to Mrs. Cleveland relating to her husband's death, the middle letter of his name is written "B." instead of "P." An examination of the bill of exceptions satisfies us that it is a clerical error of the official stenographer in taking down the testimony and transcribing his short-hand notes of the same. The transcript makes it appear that the plaintiffs introduced in evidence a deed from Hotaling to John B. Cleveland and a mortgage from John B. Cleveland to Housel. Yet an examination of the instruments referred to, copies of which are in the record, shows that in each the middle initial of Mr. Cleveland's name is written "P." To suggest that plaintiffs proved the death of a person who was never connected with the property in any manner and searched among his papers for the deeds in plaintiffs' chain of title is to reflect upon the intel'gence of their counsel without any just grounds therefor.

Lastly, it is contended that there is no proof that plaintiffs are the persons named in the deed from Hotaling to Cleveland as remainder-men. The undisputed testimony shows that the witness, Mrs. S. S. Cleveland, was the wife of John P. Cleveland, and that plaintiffs are his children. The names of all but two correspond exactly to the names mentioned in the deed, and these two, Mary H. and Sarah A., it is established beyond controversy, are sisters of the other plaintiffs, but, as already stated, are married, respectively, to Rupert and Burchmore. There is no evidence which in the least casts any suspicion upon the identity of the plaintiffs with the persons named in the deed as remainder-men, and the only conclusion we can draw from the testimony is that such identity is shown.

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The judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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JOHN W. JOHNSON ET AL. V. WILLIAM TORPY ET AL.

[FILED NOVEMBER 2, 1892.]

1. **Joint Tort Feasors: CONTRIBUTION.** In determining whether one joint wrong-doer is entitled to contribution from another the test is, whether the former knew, at the time of the commission of the act for which he has been compelled to respond, that such act was wrongful.
2. ——— : ——— : **INTOXICATING LIQUORS: DAMAGES FOR UNLAWFUL SALE.** T., a licensed saloon-keeper, sold intoxicating liquor to R., an habitual drunkard, for which the wife of the latter recovered judgment against him on his bond. T. having satisfied said judgment, sued J., another saloon-keeper in the same village, to enforce contribution on the ground that the latter had also sold liquor to R. which contributed to the injury for which the wife of the latter had recovered. As the undisputed evidence proves that R. was known to be a common or habitual drunkard at and before the sale of the liquor to him, the presumption is that T. knew when he sold the liquor in question that he was doing a wrongful and unlawful act and he is therefore not entitled to contribution from J.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

J. Hall Hitchcock, E. W. Thomas, and S. P. Davidson for plaintiffs in error.

D. F. Osgood, and Tallat & Bryan, contra.

Post, J.

This was an action in the district court of Johnson county to enforce contribution on account of a judgment against the defendants in error on the bond of Torpy, a licensed saloon-keeper. It appears from the petition that said Torpy obtained a license from the village board to sell liquor in the village of Sterling, and gave bond as required by law, with the other defendants in error as sureties, and that Johnson, the plaintiff in error, was also a licensed saloon-keeper in said village, having given bond with the other plaintiffs in error as sureties. It is further alleged that during the year for which said licenses were issued, Sarah Rowell commenced an action in the district court of said county against the plaintiff below, Torpy, on his bond, the cause of action stated being the sale to her husband, William Rowell, of intoxicating liquors which caused or contributed to the death of the latter; that said action resulted in a judgment against Torpy and sureties in the sum of \$1,000 and costs, which they have fully satisfied, and that the plaintiff in error, Johnson, defendant below, sold liquor to said Rowell which also contributed to his death. They accordingly ask judgment for \$740, being the one-half of the amount paid to satisfy the judgment aforesaid, with costs. A trial was had in the district court which resulted in a verdict and judgment for the plaintiffs below, whereupon the case was removed to this court by petition in error. On the part of the plaintiffs in error it is claimed that under the provisions of our statute the furnishing of intoxicating liquors must be regarded as a tort and all who participate in it as wrong-doers, between whom there can be no enforced contribution, while on the part of the defendants in error it is contended that the cause of action against them for the furnishing of liquor to Rowell was a mere statutory liability for an act not illegal either at common law or by statute; hence, all who con-

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tributed to his death are as between themselves jointly liable therefor. After a careful examination of the record we have reached the same conclusion as counsel for plaintiffs in error, although by a somewhat different course of reasoning, viz.: From the allegations of the petition of Mrs. Rowell it is apparent that the said William Rowell was, at the time the cause of action accrued against defendants in error, a common or habitual drunkard within any judicial definition of the term. (*Com. v. Whitney*, 5 Gray [Mass.], 86; *Com. v. McNamee*, 112 Mass., 286; *Magahay v. Magahay*, 35 Mich., 210.)

The testimony of witnesses for defendants in error, which is not contradicted, clearly proves that for several months last previous to his death, which occurred on the 28th day of August, 1888, said Rowell was in the habit of drinking to excess; that from the time the license was issued to Torpy, in the month of May previous, he, Rowell, was generally under the influence of liquor when possessed of the means of procuring it, and that his reputation was that of a common drunkard.

The sale of intoxicating liquor to a common or habitual drunkard is unlawful in a double sense—first, as the ground for a civil action by one who is injured thereby; and second, a violation of the statute, which imposes upon the sellers a severe penalty therefor. (See section 10, chapter 50, Compiled Statutes.) In determining whether the right of contribution exists in favor of one wrong-doer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy. (Maxwell, Code Pleading, 64, 172; *Jacobs v. Pollard*, 10 Cush. [Mass.], 287; *Armstrong Co. v. Clarion Co.*, 66 Pa. St., 218; *Lowell v. R. Co.*, 23 Pick. [Mass.], 24; *Acheson v. Miller*, 2 O. St., 203; *Barley v. Bussing*, 28 Conn., 455; *Adamson v. Jarvis*, 4 Bing. [Eng.], 66.)

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Since the proofs clearly show that Rowell was an habitual drunkard, within the meaning of the statute, at the time of the sale to him of the liquors for which his widow recovered in the action against Torpy, the latter must be presumed to have known, when he sold such liquor, that he was doing a wrongful and unlawful act, for which he was liable to be punished by indictment. Had he been on trial for a violation of the statute against selling intoxicating liquors to an habitual drunkard, it would not have been necessary for the state to allege or prove knowledge by him that the party named in the indictment was an habitual drunkard; that fact, under our statute, is purely a matter of defense. (Bishop, Statutory Crimes, sec. 1022.) As the sale of the liquor by Torpy to Rowell appears from the evidence to have been wrongful within the knowledge of the former, the judgment of the district court should be reversed and the case remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

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ATCHISON & NEBRASKA RAILROAD COMPANY v. A. P.
FORNEY.

[FILED NOVEMBER 2, 1892.]

1. **Eminent Domain: CONDEMNATION PROCEEDINGS: JUDGMENT ON APPEAL FROM AWARD.** The judgment of the district court on appeal from an award in a condemnation proceeding for right of way is conclusive upon the parties thereto as to all matters actually litigated therein, and also as to all matters necessarily within the issues joined, although not formally litigated.
2. **Railroads: RIGHT OF WAY: CONDEMNATION PROCEEDINGS: DAMAGES.** A railroad company built its track along an alley

and across S. street in the town of R. at an elevation of twenty feet above the level of the ground, upon trestle-work, the benches of the foundation of which rest mostly in the alley, but extending onto the lots adjacent thereto and in the street, being about twenty feet apart. It condemned twenty-five feet of lots 15 and 16 in block 5 next to the said alley for right of way. An appeal was taken from the award of damages to the district court, where judgment was rendered in favor of F., the owner of the lots. *Held*, That the construction of the track is a direct injury to the property, for which the owner was entitled to recover damage in the condemnation proceeding.

3. ——— : ——— : OBSTRUCTION OF STREET: ACTION FOR DAMAGES: RES JUDICATA. In a subsequent action by F. against the railroad company to recover damage for the obstruction of S. street by said track adjacent to said lots, in the absence of evidence to the contrary, *held*, the presumption is that the cause of action stated in the petition was included in the judgment in the condemnation proceeding, and is now *res judicata*.

ERROR to the district court for Richardson county.
Tried below before APPELGET, J.

Marquett & Dewese, and E. W. Thomas, for plaintiff in error.

John Gagnon, and C. Gillespie, contra.

POST, J.

This was an action by the defendant in error to recover for damages on account of the appropriation by plaintiff in error, defendant below, of a street and alley adjacent to his property in the town of Rulo, in Richardson county. It appears from the petition that the defendant in error is the owner of lots 15 and 16, in block 5, in Rulo proper; that said property is situated at the intersection of Stutzman and Commercial streets; that Stutzman street runs east and west and bounds said lots on the north; that Commercial street runs north and south and bounds said lots on the east, and that an alley extends through said block from north to south and is the western boundary

of the lots aforesaid. It is further alleged that a building situated on lot 16, near the northwest corner thereof, had been used by plaintiff below, and his tenants for many years as a hotel, and that owing to the sloping character of the ground at that point, the only convenient means of access to said hotel was through the said alley; that some time in the summer of 1886 the defendant below constructed, and has since that time continuously used, a line of railroad through said alley adjacent to said lots, and over and across Stutzman street at and adjacent to the northwest corner of said property; that the track of said railroad through said alley and over said street is twenty feet and more above the level of the ground and is supported by timbers, the benches of which are about eighteen feet apart and so constructed as to make a continuous frame of trestle-work, and that the benches or supporting timbers for said track over Stutzman street are placed inside of said street so that they interfere with the right of way therein, to plaintiff's damage, etc.

The defense relied upon below was, first, a license from the town board; second, a judgment and satisfaction thereof in a condemnation proceeding. The allegation with respect to the condemnation proceeding was not controverted by the plaintiff below, but at the trial the court held that the judgment in that proceeding did not include any cause of action which might have accrued in his favor for the obstruction of the street and alley, and instructed the jury to find for the plaintiff, notwithstanding the condemnation proceeding. This direction we all agree was error, for which the judgment of the district court must be reversed. The evidence, to say the least, tends to prove that the damages claimed in this action were included in the award in the condemnation proceeding, and that question should have been submitted to the jury. The rule is well settled in this state that where the record does not disclose upon what particular cause of action or defense the judgment is

based, parol or other evidence may be received for the purpose of proving what issues were tried and settled by the finding and judgment (*Wilch v. Phelps*, 16 Neb., 515; *Freeman*, Judgments, 272), although where a cause of action is directly within the issues presented by the pleadings in a former suit or proceeding, the presumption is that it was considered and settled by the judgment therein rendered (*Id.*; *McDaniel v. Fox*, 77 Ill., 343). There is, however, a more serious objection to the judgment in this case, viz., it is apparent from the record that the question at issue herein was in fact considered and determined in the condemnation proceeding, and that it is now *res judicata*. The petition or application addressed to the county judge for the appointment of commissioners to assess damages, etc., is in due form, and, among other tracts, names the west twenty-five feet of lots 15 and 16 in block 5, in Rulo proper. Subsequently the commissioners filed their report or award as follows:

“ We, the undersigned, disinterested freeholders and commissioners, residents of Richardson county, Nebraska, appointed by the county judge of said county to appraise the damages accruing to the following named owners and lienholders by reason of the appropriation of the hereinafter described lots, parts of lots, and parcels of land taken for right of way, side tracks, and railroad purposes by the Atchison & Nebraska Railroad Company, situated in Rulo proper, * * * in Richardson county, Nebraska, as shown on the map of said railroad as submitted to us by the agent of said railroad company, and belonging to the hereinafter named owners and lienholders, having been duly qualified, and each having personally examined the premises on the day pursuant to adjournment from June 26, 1886, and at the time mentioned in the notice filed with the county judge at the office of said county judge in said county, find the value and damages according therefor as follows:

“ Lots 15 and 16, block 5, Rulo proper—A. P. Forney

and Geo. Bowker, owners of west twenty-five feet of lots 15 and 16, block 5, \$1,650. And all other damages accruing by reason of the taking of said lots and parcels of land we hereby appraise, and accordingly award, said values and damages at the total sums set opposite said owners' and lien-holders' names."

From this award the railroad company took an appeal to the district court, where a trial was had, resulting in a judgment for the defendant in error, Forney, which has been paid and satisfied in full.

It further appears to be undisputed that, at the time of the trial of the case on appeal, the track had been fully completed and was in operation along the alley and across the street in question, and that the jury, under the direction of the court, were taken to view the premises. The whole question of the damage to the property was certainly submitted to the jury upon the very best of evidence, viz., the senses of the jurors themselves. When they inspected the property in order to assess the damage of defendant in error they must have observed, not only the situation of the track with reference to the buildings, but also the elevation thereof along the alley and in the street. They saw the foundations or benches upon which the trestle-work rests, extending from the alley onto the lots, and the track extending along the alley and across the street at an elevation of twenty feet and upward, and they could not have excluded the obstruction of the street from their estimate of damage. That was certainly one of the elements of damage, since its direct tendency was to diminish the value of the property. This is but stating in different language the rule that a single cause of action, whether arising *ex contractu* or *ex delicto*, is indivisible. (Freeman, Judgments, 238, 241; *Gapen v. Bretternitz*, 31 Neb., 302.)

Decisions of this court are uniform to the effect that an action for damage will lie in behalf of the owner of property abutting upon a public street, where his easement is

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interfered with in the construction of a railroad track, although no part thereof is appropriated. This rule is so well settled as to render the citing of the cases entirely superfluous. It has also been held that the statutory remedy by condemnation proceeding, when once instituted, is exclusive as to all damage for the proper construction of the road. (*F., E. & M. V. R. Co. v. Whalen*, 11 Neb., 585; *R. V. R. Co. v. Fink*, 18 Id., 82; *C., K. & N. R. Co. v. Wiebe*, 25 Id., 542.) As said by the present chief justice in *R. V. R. Co. v. Fink*, "The statutory mode of acquiring the right of way and ascertaining the damages therefor is exclusive as to the manner of assessing the value of the land taken, with damage to the residue of the tract." In the recent case of the *A. & N. R. Co. v. Boerner*, 34 Neb., 240, the question now involved was carefully considered by Judge NORVAL. In that case the point at which the street was obstructed by the railroad track was more than one thousand feet distant from the property involved in the prior condemnation proceeding. Although it was held that there was no presumption that the question of damage was adjudicated in the condemnation proceeding, it is said in the second point of the syllabus: "The judgment of the district court on appeal from an award of damages in condemnation proceedings is conclusive upon the parties as to all questions actually litigated therein, and as to all matters necessarily within the issue joined, although not formally litigated." One cause of action in that case was the obstruction of an alley adjacent to the property by an elevated track, as in this case, but it was held that the conclusive presumption is that compensation for that injury had been allowed in the condemnation proceeding. It is said in the opinion, "Boerner was entitled to have all proper elements of damage considered by the commissioners, and if they failed so to do he cannot afterwards maintain an action to recover the damage then omitted, which was necessarily involved in the issues in the condemnation

proceeding, and which he was bound to present for their consideration therein." And in *R. Co. v. Weimer*, 16 Neb., 272, it was held, in a condemnation proceeding, that the proprietor was entitled to recover on account of a deep cut in a highway adjacent to his property.

The question how remote the obstruction in a street must be from the property involved in a condemnation proceeding to entitle the owner to maintain a subsequent action therefor, may involve difficulty in its solution; nor have we any occasion to assert a general rule on the subject. The obstruction for which defendant in error claims is so near to his property as to amount to a direct injury to the property itself, so that both the commissioners and the jury in the district court must have taken it into consideration in their estimate of damage. The rule for assessing damage in such cases is well settled in this state, viz.: First, the value of the land actually taken (in this case twenty-five feet next to the alley); second, the depreciation in value, if any, of the remaining part of the tract caused by the construction of the railroad. (*R. Co. v. Marley*, 25 Neb., 138; *Blakeley v. C., K. & N. R. Co.*, Id., 207.) The jury, therefore, in assessing the damage in the condemnation proceeding must have determined the extent of the depreciation in value of the lots in question by the construction of the track, and we are no more at liberty to presume that the obstruction in the street was excluded from their consideration than that they overlooked a building situated on the property itself. The judgment of the district court should be reversed and the case remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA V. TIM O'ROURK ET AL.

[FILED NOVEMBER 10, 1892.]

1. **Sunday Law: SPORTING.** Under the provisions of section 241 of the Criminal Code any person of fourteen years of age or upwards who shall, on Sunday, engage in sporting, etc., shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail not exceeding twenty days, or both.
2. ———: ———: **PLAYING BASE-BALL.** Playing base-ball on Sunday comes within the definition of sporting, and renders the persons engaging therein liable to the punishment provided for in section 241.

EXCEPTIONS to the decision of the district court for Lancaster county, HALL, J., presiding. Filed under the provisions of section 515 of the Criminal Code.

The defendants were arrested on a complaint charging them with violating section 241 of the Criminal Code, by playing base-ball on Sunday, as an exhibition at which an admission fee was charged. The case was tried on a stipulation of facts before the county judge. He held that the complaint and stipulation do not charge or establish facts constituting an offense under the laws of the state of Nebraska. The defendants were discharged. Upon a hearing in the district court the decision of the county judge was sustained. The county attorney filed exceptions and removed the cause to this court to settle the law. *Exceptions sustained.*

Novia Z. Snell, County Attorney, Frank W. Lewis, and J. R. Webster, for the state:

The Christian religion and the sanctity of Sunday as a holy day are parts of the fundamental law of the United States. (*People v. Ruggles*, 8 Johns. [N. Y.], 290; *Campbell v. International Society*, 4 Bos. [N. Y.], 298; *Common-*

wealth v. Jeandelle, 3 Phila., 509; *Moore v. Hagan*, 2 Duv. [Ky.], 437; *Davis v. Fish*, 1 Greene [Ia.], 406; *Gholston v. Gholston*, 31 Ga., 625; *Weldon v. Colquitt*, 62 Id., 449; *State v. Ricketts*, 74 N. Car., 187; *Lindenmuller, v. People*, 33 Barb. [N. Y.], 548; *Commonwealth v. Eyre*, 1 S. & R. [Pa.], 347; *Johnson v. Commonwealth*, 22 Pa. St., 102; *Stockden v. State*, 18 Ark., 186; *Kilgour v. Miles*, 6 Gill. & J. [Md.], 268; *Commonwealth v. Wolf*, 3 S. & R. [Pa.], 48; *Lieberman v. State*, 26 Neb., 469; *Commonwealth v. Depuy*, Brightly Rep. [Pa.], 44; *State v. Amba*, 20 Mo., 214; *Nashville v. Linck*, 12 Lea [Tenn.], 499; *State v. King*, 23 Neb., 546.) The Sabbath being so regarded and recognized by the law, the community have and ought to have power to enforce its observance. (*Scammon v. Chicago*, 40 Ill., 146; *Cotton v. Huey*, 4 Ala., 56; *Brackett v. Edgerton*, 14 Minn., 174; *Shaw v. McCombs*, 2 Bay [S. Car.], 232; *Kountz v. Price*, 40 Miss., 341; *O'Donnell v. Sweeney*, 5 Ala., 467; *Commonwealth v. Nesbitt*, 34 Pa. St., 398; *State v. B. & O.*, 15 W. Va., 362; *Shover v. State*, 10 Ark., 259; *State v. Mark*, 9 S. E. Rep. [Va.], 475; *Towle v. Larrabee*, 26 Me., 464; *Rapp v. Reehling*, 23 N. E. Rep. [Ind.], 777; *Allen v. Gardner*, 7 R. I., 22; *People v. Scranton*, 61 Mich., 244; *Lorejoy v. Whipple*, 18 Vt., 379; *Troenert v. Decker*, 51 Wis., 46.)

Except where a word, term, or phrase is especially defined, all words used in the Criminal Code are to be taken and construed in the sense in which they are understood in common language. (Criminal Code, sec. 254.) Under this rule of construction, the word "sporting," as used in section 241 of the Criminal Code, includes playing base-ball. (Webster's Dic.; Century Dic.; Encycl. Dic.)

Charles E. Magoon, contra.

In the absence of a statute there is no legal obligation to observe Sunday as distinguished from any other day of the week. (*Bloom v. Richards*, 2 O. St., 387; *McGatrick*

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v. Wason, 4 Id., 566; *More v. Clymer*, 12 Mo. App., 11; *Commonwealth v. L. & N. R. Co.*, 80 Ky., 291.) Playing base-ball is an athletic exercise, the same as walking, running, riding, and rowing, and is not prohibited by the statute. Walking does not violate statute. (*Hamilton v. Boston*, 14 Allen [Mass.], 475; *Davidson v. Portland*, 69 Me., 116; *O'Connell v. Lewiston*, 65 Me., 34.) Nor does driving or sailing. (*Nagle v. Blown*, 37 O. St., 7.) Nor does shaving customers. (*State v. Lorry*, 7 Baxt. [Tenn.], 95.) Nor does transporting cattle. (*Phila. & B. R. Co. v. Lehman*, 56 Md., 209.) Nor repairing switch on railroad. (*Yonoski v. State*, 79 Ind., 393.) Nor gathering grain. (*Turner v. State*, 67 Ind., 595.) Nor labor to prevent waste of sap in making maple sugar. (*Whitcomb v. Gilham*, 35 Vt., 297.) Nor is playing base-ball on Sunday a violation of the law. (*St. Louis Association v. Delano*, 37 Mo. App., 284.)

The legal definition of sporting is "killing and taking game on a man's own land." (Rapalje's Law Dic.) This being the well known meaning of the term at common law, its use in the statute is restricted to that sense. (Sutherland, Statutory Construction, sec. 253, and cases cited.)

MAXWELL, CH. J.

In April, 1891, the county attorney of Lancaster county filed in the county court a complaint as follows:

"The complaint and information of James G. Guild of said county made before me, Willard E. Stewart, county judge of said county, on this 30th day of April, A. D. 1891, who, being duly sworn on his oath, says: That Tim O'Rourke, Charles S. Abbey, Clarence Baldwin, John O'Brien, Clarence Conley, William Goodenough, Frederick Ely, Charles Hamburg, Jewett Meekin, Charles Collins, John Cline, Henry Raymond, John Rowe, Jesse Burkett, John Irwin, Owen J. Patten, Philip Tomney, Park Wilson, Emmett Rogers, William Darubrough, each of said

persons being of the age of fourteen years and upwards, on the 26th day of April, A. D. 1891, said day being the first day of the week, commonly called Sunday, at said county of Lancaster, did unlawfully engage in sporting, and were found sporting and engaged in the game commonly called base-ball, at Lincoln Park base-ball grounds, an enclosure where the game or athletic sport commonly known as base-ball is played and performed as an exhibition by professional players to spectators who are admitted to such exhibition for a fee and reward by such spectators paid to view the same, there being then present about thirty-five hundred spectators at the time aforesaid and place aforesaid, viewing said athletic sport, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska.

"Affiant further says the said Tim O'Rourke, Charles S. Abbey, Clarence Baldwin, John O'Brien, Clarence Conley, William Goodenough, Frederick Ely, Charles Hamburgh, Jewett Meekin, Charles Collins, John Cline, Henry Raymond, John Rowe, Jesse Burkett, John Irwin, Owen J. Patten, Philip Tomney, Park Wilson, Emmett Rogers, William Darnbrough, each of said persons being of the age of fourteen years and upwards, on the 26th day of April, A. D. 1891, said day being the first day of the week, commonly called Sunday, at the county of Lancaster, at Lincoln Park base-ball grounds, an enclosure where the game or athletic sport commonly known as base-ball is played and performed by professional players employed and hired for and during a fixed period of six months then current at a fixed and agreed reward and monthly salary to pursue the vocation of playing said game of base-ball for the entertainment of spectators for hire, did unlawfully engage in common labor, to-wit, performing the game or athletic sport commonly known as base-ball for hire, the same being their regular employment and vocation, in which said employment and vocation they were then and

there found, such common labor not being a work of necessity or charity, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

The parties were thereupon arrested and taken before the county judge for trial.

The attorneys for the parties entered into an agreement as to the facts as follows:

"It is hereby stipulated and agreed that this case shall be submitted to the above named county judge for trial and determination upon the following agreed state of facts, viz.:

"First—On Sunday, the 26th day of April, 1891, between the hours of 3 o'clock and 5 o'clock P. M., in the county of Lancaster and state of Nebraska, the defendants played a game of base-ball.

"Second—On said 26th day of April, 1891, each of said defendants was over the age of fourteen years.

"Third—The playing of said game of base-ball was not a work of charity or necessity.

"Fourth—Three thousand spectators were present at the time said game of base-ball was played and paid an admittance fee for the privilege of viewing said game while it was being played, but no part of said admittance fee was paid to or received by the defendants or any of them.

"Fifth—On the day said game of base-ball was played the defendants were each under employment by the month to play base-ball for compensation, but playing base-ball was not the usual or ordinary vocation of the defendants or any of them.

"Sixth—Said game of base-ball was played upon the grounds of private parties, and was not played within one-half mile of any dwelling house, school house, church building, or the limits of any incorporated city or village. Said game was not played within one hundred yards of any public highway, and the grounds upon which said game was played were enclosed by a tight board fence ten

feet high, which fence completely obstructed the view from the outside of said enclosure. Said game was not played for any stake, wager, or thing of value.

“Seventh—Upon the foregoing agreed state of facts, and without further testimony or evidence, this case shall be submitted to said county judge for trial and determination.”

The case was then submitted to the county judge upon the complaint and stipulation of facts. He held that the “complaint and stipulation of facts do not charge or establish facts constituting an offense under the laws of the state of Nebraska,” and therefore discharged the persons accused. The case was taken on error to the district court to settle the law relating to the matter. The district court affirmed the judgment of the county court, whereupon the county attorney asked and obtained leave of this court to file a petition in error to settle the law of the case.

Section 241 of the Criminal Code provides: “If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing, or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in any sum not exceeding five dollars nor less than one dollar; *Provided*, Nothing herein contained in relation to common labor on said first day of the week, commonly called Sunday, shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath, nor to prevent families emigrating from traveling, watermen from landing their passengers, superintendents or keepers of toll bridges or toll gates from attending

and superintending the same, or ferrymen from conveying travelers over the water, or persons moving their families on such days, or to prevent railway companies from running necessary trains."

Webster defines "sporting," "1. To play; to frolic; to wanton. 2. To represent by any kind of play," and as synonyms gives "to play; frolic; game; wanton." (Ed. of 1881, p. 1276.) The definitions in the Century are the same, but somewhat more extended. In the same authority (Webster), p. 111, "base-ball" is defined as "a game of ball, so called from the bases or bounds (usually four in number) which designate the circuit which each player must make after striking the ball." That playing base-ball comes within the term "sporting," and is, therefore, a violation of the statute, there can be no doubt.

But it is claimed, in effect, that restraint of the kind named is in contravention of natural right or religion, and therefore is in excess of the powers of the legislature. The right of free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and to fully discuss the same, is secured to every one. Free discussion, however, is the outgrowth of free government. All free government is based on the divine law. God gave the ten commandments to Moses, which contain rules designed to apply to the whole race. Although given to the Israelites, they were designed for all humanity. The Israelites were constantly lapsing into idolatry. There are noble examples of manhood, however, in their history, but the ignorance of the public, the almost continuous wars, internecine, offensive, or defensive, together with the pagan influences of the surrounding nations, prevented the development of the nation, and it became a prey to the Babylonians, and later to the Roman empire. If we look at the world at the time of the birth of Christ, there was not, so far as we know, a nation where equal and just rights were enjoyed by all, nor where the rights of the poor were adequately

protected and enforced, if indeed, considered. The Roman empire, then at the height of its power, had much to commend it. Many of its rulers were men of genius, ability, and manhood, but punishments of all kinds were of the most cruel character; war was carried on for conquest and with a degree of barbarity that shocks our feelings of humanity. Captives were sold into slavery and practically possessed no rights that their masters were bound to respect. A pastime of the Roman populace was to witness deadly contests of captives with wild beasts or each other. Even as late as the third century after Christ's birth this barbarous practice was in force. Gibbon, in the *Decline and Fall of the Roman Empire*, vol. I, p. 386 (Millman ed.), says: "We cannot, on this occasion, forget the desperate courage of about fourscore gladiators, reserved, with near six hundred others, for the inhuman sports of the amphitheatre. Disdaining to shed their blood for the amusement of the populace, they killed their keepers, broke from the place of their confinement, and filled the streets of Rome with blood and confusion. After an obstinate resistance, they were overpowered and cut in pieces by the regular forces; but they obtained at least an honorable death, and the satisfaction of a just revenge." Cruelty was the rule and death inflicted as punishment for trivial causes. Specimens of Roman justice may be seen in the trial of Christ before Pilate, and Paul before Felix and Festus. In neither case was there the semblance of an accusation based upon law; yet Christ was condemned to please a mob and Paul would have been delivered to men who had sworn to kill him but for his appeal to Cæsar, and even then he was held a prisoner for two years without a charge against him. The indigent, unfortunate, and discouraged were permitted by the law to sell themselves as slaves, and the rights of the poor were to a great extent at the mercy of the rich and powerful. While there were amphitheatres for the exhibition of brutal contests between men and wild beasts, or between captives to furnish

amusement to an unfeeling populace, there were no public hospitals for the insane, sick, or unfortunate. In addition to this, covetousness, licentiousness, and other vices prevailed to an extent unknown at the present time, nor, so far as we are informed, was any nation superior in any of these respects to the Romans. The most favorable view that can be taken of any government of that date is to say that might alone controlled, and right was a remote consideration.

The birth of Christ was ushered in by the proclamation by angels of peace, "Glory to God in the highest, and on earth peace, good will toward men." (Luke. 2:14.) His birth was among the poor and lowly, as if to show that wealth is a mere circumstance which adds nothing to either the usefulness or respectability of its possessor. He taught purity of life, unselfishness, good will toward friends and foes alike, doing good to all as opportunity offered; that religion affected and controlled the life of the individual, and did not consist in mere outward observances. He condemned covetousness, licentiousness, selfishness, and self-righteousness, and insisted on the equality of the race. He practiced his own preaching, and led a life of poverty, purity, and doing good. None so poor as not to claim his sympathy and assistance, nor so wealthy and great as to be above his consideration. The lepers, the blind Bartimeus, the rich centurion, alike were recipients of his beneficence. All were welcome, the only conditions being that they needed his aid and applied for it. His unselfishness, His magnanimity, the nobility of His character were misunderstood by those who were looking for a deliverer from the Roman yoke, and by others who had been taught to regard the law of Moses as perfection. The Jews, who, as the children of Abraham, deemed themselves the favored people of God, were neither expecting nor desiring a leader for mankind, but rather one who, like Moses, would lead them out of hated Roman bondage; neither could they

understand a system that, while accepting much of the law of Moses, proposed to supersede its rites and ceremonies. Many centuries before, the prophets in glowing language had foretold the birth of a son, the Prince of Peace, who would establish His throne with judgment and justice forever. These statements seem to have been taken literally, as applying alone to an earthly prince who should destroy the enemies of the Jews. It is apparent, however, that the prophets' utterances refer to a spiritual ruler who would conquer by love, and whose followers would be guided by his precepts and establish justice and right.

From the crucifixion of Christ until the present time the contest between Christianity and wrong has been going on. Wherever Christianity has prevailed free and untrammelled, liberty has existed. It forbids cruelty, haughtiness, arrogance, pride, licentiousness, and covetousness. It requires a return of good for evil, and aid for the suffering in distress, whether friend or foe, and has established the rule that we shall do unto others as we would have them do unto us. It requires honesty, honor, and integrity in all the affairs of life, and fair treatment for every one. In every Christian land it has swept away the harem and seraglio, made bigamy and polygamy crimes, and elevated woman from a condition of semi-serfdom to be the equal of man. It has broken the captive's chains and mitigated the horrors of war, and there are indications that between Christian nations at least soon "They shall beat their swords into ploughshares and their spears into pruning hooks." It has abolished slavery in every Christian land and enfranchised the slave and given him an opportunity to develop his manhood. It has ennobled labor and established the rule that "the laborer is worthy of his hire." We admire the declaration of independence as a statement of principles based upon the equality of the race and give credit to the authors as statesmen and benefactors, not only of this nation, but mankind. The sturdy independence of

the barons who at Runnymede compelled King John to sign *Magna Charta*, has been the subject of eulogy in both song and story, but the principles of both are found in the sermon on the mount. It may safely be said that the charter of liberty reaches back to Christ's teaching. Christianity is woven into the web and woof of free government and but for it free government would not have existed, because no other system has been able to check the selfishness, greed, arrogance, cruelty, and covetousness of the race.

In *People v. Ruggles*, 8 Johns. [N. Y.], 294, in a prosecution for blasphemy, Ch. J. Kent said: "There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane, for, to use the words of one of the greatest oracles of human wisdom, 'profane scoffing doth by little and little deface the reverence for religion,' and who adds in another place, 'two principal causes have I ever known of atheism—curious controversies and profane scoffing.' (Lord Bacon's Works, vol. 2, 291–503.) Things which corrupt moral sentiment, as obscene actions, prints, and writings, and even gross instances of seduction, have, upon the same principle, been held indictable, and shall we form an exception in these particulars to the rest of the civilized world?"

It may be true that the professed followers of Christ are not, in all cases, as unselfish as they should be, or as is their right and privilege, but progress is being made in that direction and many examples of self-denial and unselfishness may be found. Let a cry of distress and a call for help come from any part of the world by reason of some great calamity, and the Christian nations at once respond by liberal contributions and other means to relieve the distress. Schools and colleges are liberally provided and patronized, and education is general. Hospitals and asylums exist on every hand for the poor, the insane, the blind, deaf, and unfortunate, while punishments for offenses are graduated in proportion to the offense, and a conviction can only take place after a fair public trial upon specific charges, and death is imposed in no case except murder or treason. No fair-minded student of history will deny that these benefits and liberty itself flow from Christianity. It appeals alone to reason and asks for adoption because of its excellence. It makes no person the keeper of another's conscience, but requires every one to judge and act for himself. It tolerates the utmost freedom of opinion and worship, and seeks to coerce no one except by the force of reason.

But while allowing the force of reason to be the sole guide in the adoption or rejection of Christianity, its followers have been impelled from duty to combat wrong and oppression on every hand. These were strongly intrenched in the selfishness, covetousness, and other vices of the race, so that they have yielded slowly, but they have been gradually dispelled like clouds after a storm, so that the sun shines almost clearly, and without obstruction. This result has been brought about by almost constant effort, and has cost the lives of hundreds of thousands of martyrs and patriots, and it can only be preserved by constant vigilance.

As a Christian people, therefore, jealous of their liberty and desiring to preserve the same, the state has enacted

certain statutes, which, among other things, in effect, recognize the fourth commandment, and the Christian religion and the binding force of the teachings of the Saviour. Among these is the statute which prohibits sporting, hunting, etc., on Sunday.

The human body, considered as a machine, is the most perfect mechanism of which we have any knowledge. If properly cared for and treated, it will, in ordinary cases where there are no hereditary defects, retain its vitality and vigor to old age, but every movement of the body or action of the brain involves waste of the vital force, and this the Creator has provided shall, to a great extent, be replenished during sleep. Hence, it is necessary to spend about one-third of our time in sleep. While it is true that the reserve force of life is so great in many persons as to enable them to live for a time with less than the normal amount of sleep required, yet, if continued for any considerable time, the general health will be affected, and to entirely abstain from sleep for a week or more, as in cases of certain fevers, like the typhoid, almost unavoidably results in temporary insanity, if not death. But the recuperation from sleep in most cases does not restore full tone to the system, and Sunday is like an oasis in the journey of life where each traveler may be refreshed and become more able to continue the performance of his duties or labors. As a natural consequence, if the vitality of the body is permitted steadily to decrease without being replenished, life will be proportionately shortened. Therefore, if a person labors continuously at hard and exacting labor without rest for many years, his health is liable to be impaired and he become prematurely old. No doubt one of the objects of the Creator in establishing the Sabbath as a day of rest was to provide for restoring and retaining, as far as possible, health and strength and perfect action of the body. Every person of observation knows that the man who labors seven days in the week continuously for any considerable length

of time lacks the spring and elasticity of action of another of like years and naturally active habits who rests on Sunday. Experience has also shown that men will accomplish more labor in a series of years by working six days in the week than by continuous application.

Sunday is to be a day of rest. Worldly cares are to be laid aside, and the worries of business or pleasure thrown off. How gladly the tired laborer, workman, farmer, merchant, manufacturer, attorney, and judge welcome Sunday as a day of rest and on the succeeding Monday enter upon their respective labors with renewed strength and vigor. The idler and trifler may complain of the loss of time from resting on Sunday; but the active, intelligent, worker knows that thereby he has increased his capital stock of health and chances of longevity. Christ sought to apply the Sabbath to its appropriate use. The Jewish religion at that time consisted largely of outward ceremonies which were performed with a rigor never intended by the author of the Mosaic law. It is evident that great reliance was placed upon these outward ceremonies. Christ, however, while not condemning many of these ceremonies, intended to show that the mere observance of these was not sufficient; that the Sabbath was made for man, and not man for the Sabbath; and in effect, therefore, that works of charity, mercy, and necessity not only could, but if necessary should, be performed on that day. He recognized the Sabbath, however, as a day of rest set apart by the Creator. After His death and resurrection, His disciples, to commemorate that event, changed the day to the first day of the week, and that day is now observed by the great body of His followers throughout the world, and is recognized by both the common and statute law.

In this state the right of every one to worship God according to the dictates of his own judgment and conscience is recognized, and hence permits those who prefer to keep the seventh in place of the first day of the week to do so.

The law, both human and divine, being thus in favor of abstaining from sporting, etc., on Sunday, is a reasonable requirement and should be enforced. The deliberate violation of such a law, there is reason to believe in many cases, is but the commencement of a series of offenses that lead to infamy and ruin; and in any event the influence upon the participants themselves has a tendency to break down the moral sense and make them less worthy citizens. The state has an interest in their welfare and may prevent their violation of the law. The state, in order to prevent vice and immorality, may punish licentiousness, gambling of all kinds, the keeping of lotteries, enticing minors to gamble, or to permit one under eighteen years of age to remain in a billiard room; to punish publishing, keeping, selling, or giving away any obscene, indecent, or lascivious paper, book, or picture, and also punish any person who shall lend or show to any minor child any such paper, publication, or picture, etc. The law also punishes the disturber of a religious meeting, school meeting, election, etc. These cases show the importance felt by the legislature, of evils of the kind named, and others, by means of which, in addition to wrongs inflicted on the persons injured, a spirit of insubordination is created and fostered which incites to evil and tends to subvert the just and equal rights of some, or all. In addition to this, every person has a right to the quiet and peace of a day of rest. He has also a right to the enforcement of the law so that the evil example of a defiance of the law shall not be set before his children. The state has an interest in their welfare also, in order that they may become useful citizens and worthy and honorable members of society. The fact that the defendants were some distance away from the residence of any person can make no difference. It did not change the nature of the offense nor excuse the act. It was a violation of the law just the same.

The question here presented was before the Kansas City

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court of appeals in *State v. Williams*, 35 Mo. App., 541, and it was held the parties were liable. Afterwards the question of the validity of a contract arose. In *St. Louis, etc., Ass'n v. Delano*, 37 Id., 284, in an action upon a contract, it was held that under the Missouri statute athletic games and sports on Sunday were not prohibited. The case was then taken to the supreme court of that state, where the judgment was affirmed. (*St. Louis, etc. Ass'n v. Delano*, 18 S. W. Rep. [Mo.], 1101.) An examination of the statute shows that it is not as broad as ours. In addition to this it is evident the question of the validity of the contract was not raised by the pleadings and therefore was not in issue. Under our statute, however, sporting is clearly prohibited and the party guilty thereof is liable to the punishment provided by statute.

It is unnecessary to consider the other branch of the case.

The district court and also the county court erred in holding that the defendants were not liable, and dismissing the action.

EXCEPTIONS SUSTAINED.

THE other judges concur.

McCORMICK HARVESTING MACHINE COMPANY V. M.
K. HARTMAN.

[FILED NOVEMBER 10, 1892.]

Action on Notes Given for Harvesting Machine: GUARANTY: WEIGHT OF EVIDENCE. *Held*, That the testimony failed to show a substantial compliance on the part of the defendant with the terms of the guaranty proved, and that the verdict was against the clear weight of evidence.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Hewett & Olmstead, for plaintiff in error.

S. H. Smith, B. F. Smith, and C. H. Tanner, contra.

MAXWELL, CH. J.

On the 13th day of August, 1889, the plaintiff in error filed his petition in the court below, claiming judgment on four promissory notes given to the plaintiff in error by the defendant in error and dated July 3, 1883; one due October 1, 1883; two due October 1, 1884; and one due October 1, 1885, for the purchase price of a McCormick harvesting machine, each note being set up as a separate cause of action.

The answer thereto filed by the defendant in error admits the execution of the notes as described, pleads the statute of limitation as to the first ground of defense, and alleges as a general defense a failure of warranty of plaintiff for said machine, in this, that "the said machine was not a first-class machine and would not do good work, and the plaintiff, after being notified, failed to make it do good work, and that during the months of July, August, and September, 1883, defendant repeatedly notified plaintiff by mail, at its general office, and their local agent in person, that said machine would not do good work, and that if plaintiff could not make said machine do good work he (defendant) would not pay said notes, and that said machine was subject to their (plaintiff's) order, according to the terms of said notes. Plaintiff has failed to make good its representation and warranty."

The reply is a general denial of new matter in the answer.

On the trial of the cause the jury returned a verdict for the defendant in error, and a motion for a new trial having

been overruled, judgment was entered on the verdict dismissing the action.

The principal ground of error is that the verdict is against the evidence.

The testimony shows that the defendant purchased the machine of one Charles Stone at Hastings. The defendant in his testimony, in answer to a question by his own attorney as to the guaranty, said: "Well, he guaranteed the machine to do good work in every respect," and on cross-examination testifies: "It was guaranteed to do good work in all respects." He also states that he signed a contract which was lost, but the proof clearly shows was on a printed form, of which the following is a copy:

"These machines are all warranted to be well made, of good material, and durable with proper care. If upon one day's trial the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Company, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and his payment (if any has been made) will be refunded. Continuous use of the machine, or use at intervals through harvest season, shall be deemed an acceptance of the machine by the undersigned."

The latter warranty is the only one established by the proof.

The defendant testifies in regard to the machine as follows:

Q. When the machine run, and it took an extra team, it elevated the grain?

A. Yes, sir.

Q. The principal fault of the machine was that it pulled hard?

A. Yes, sir, and wore out fast.

Q. Anything the matter with the frame?

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A. It was crooked.

Q. Did you ever ask for another?

A. There was one sent to Stone.

Q. Did you ever call there for it?

A. No, sir.

Q. Did you ever try to take advantage or claim your rights under the guarantee from Stone?

A. I told him I would not keep the machine.

Q. You cut grain the first year?

A. Yes, sir.

Q. And the second year?

A. Yes, sir.

Q. And the next year?

A. No, sir.

Q. You rented your farm that year

A. Yes, sir.

The frame of the machine seems to have been twisted, probably from exposure to the weather, so as to be out of line. This caused it to run hard. He continued to use the machine, however, and made no attempt to comply with the only guaranty proved. It will be seen that there was no attempt on the part of the defendant to comply with the conditions of purchase; he continued to use the machine for two years, and when a new frame was sent to him permitted it to remain in the agent's hands. The testimony fails to show good faith on his part or a compliance with the terms of the warranty.

The judgment is against the clear weight of evidence, and is set aside, and a new trial granted and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CHARLES H. MEHAGAN V. L. B. McMANUS.

[FILED NOVEMBER 10, 1892.]

1. Action on Note: PROTEST WAIVED: WEIGHT OF EVIDENCE.

Under the issue made by the pleadings and proof, the question in dispute was whether or not the words "protest waived" were written upon the notes when the defendant delivered the same to the plaintiff. *Held*, That a preponderance of the evidence tends to sustain the plaintiff's contention.

2. ———: ARGUMENT OF COUNSEL. Where the attorney for the plaintiff in summing up to the jury used improper language, to which objection was made, whereupon the court said to the jury: "You must not pay any attention to that statement whatever," etc., *held*, that the language used, although improper, did not justify a reversal of the case.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

C. C. Flansburg, for plaintiff in error.

Morning & Keester, contra.

MAXWELL, CH. J.

This action was brought on two promissory notes as follows:

"\$167. St. JOSEPH, Feb. 8, 1887.

"May 1, 1888, after date we promise to pay to the order of James J. Patton one hundred and sixty-seven dollars, at St. Joseph, Mo., for value received, without defalcation or discount, with interest from date at the rate of ten per cent per annum until paid.

M. M. RILEY.

"EMMA A. RILEY."

Indorsements: "Pay Charles H. Mehagan or order. J. J. Patton. Pay John Dawson or order. Protest waived. Charles H. Mehagan. Protest waived. John Dawson."

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"\$167.

ST. JOSEPH, Feb. 8, 1887.

"November 1, 1888, after date I promise to pay to the order of James J. Patton one hundred and sixty-seven dollars, at St. Joseph, Mo., for value received, without defalcation or discount, with interest from date at the rate of ten per cent per annum until paid.

"M. M. RILEY.

"EMMA A. RILEY."

Indorsements: "Pay Charles H. Mehagan or order. J. J. Patton. Pay John Dawson or order. Protest waived. Charles H. Mehagan. Protest waived. John Dawson."

The defendant in his answer admits that the Rileys made the notes and delivered them to J. J. Patton, who indorsed them to Mehagan; and that he indorsed and delivered the same to Dawson, but denies that he wrote the words "protest waived" thereon. Second, that said notes were payable at St. Joseph, Mo., but no demand of payment was made there, whereby Patton was released from liability. Third, that the plaintiff received from Dawson security for said notes, and he thereby secured an extension of the time of payment, to which the defendant did not assent.

On the trial of the cause the jury returned a verdict in favor of the plaintiff below for the sum of \$433, upon which, judgment was rendered.

The testimony tends to show that Dawson sold and conveyed to the plaintiff in error a number of town lots for which the latter indorsed the notes and delivered them to Dawson.

The only material question in dispute is in regard to the words "protest waived" being written on the notes when the plaintiff in error indorsed the same. The plaintiff in error contends that the words were not there then, while the defendant in error contends that they were, and, in our view, a preponderance of the evidence establishes the fact that the words were on the notes when they were indorsed and delivered. The proof tends to show that

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Dawson was unacquainted with the makers of the notes, and in effect required the plaintiff in error to guarantee the notes. This he did by the indorsements in question. The record also shows the following facts :

“Counsel for plaintiff, in summing up to the jury, said, I suppose the court knows him, and I suppose he could tell you that he is the biggest crank in the United States.

“Counsel for defense object to the statement of the counsel, and ask the court to strike it out.

“By the court: I sustain the objection, and, gentlemen of the jury, you are to pay no heed to it whatever.

“By counsel for plaintiff, in further summing up to the jury: A judgment was obtained in this case in the county court against this defendant and John Dawson.

“Counsel for defense object to the statement of the counsel and move to strike it out.

“By the court: Gentlemen of the jury, you must not pay any attention to that statement whatever, as there is not a particle of evidence to that effect.”

The proper course for an attorney in an argument to a jury is to discuss the facts of the case and present them in as favorable an aspect as the truth will justify. An attack upon the character of the adverse party, or his attorney, where such character is not in issue, is almost invariably taken as an indication that he does not expect to convince the jury upon the facts, hence the appeals to their prejudices. The writer believes that a party greatly weakens his argument by that course. If, however, the attorney's sense of propriety will not prevent him from resorting to matters outside of the record, then it is the duty of the court to compel him to do so; and in this case the court did its duty, and the use of the words above set out, condemned as they were, is not sufficient to justify a reversal. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

Lyon v. Moore.

LYON & HEALY V. R. A. MOORE.

[FILED NOVEMBER 10, 1892.]

Action to Recover Damages for Breach of Warranty on Sale of Piano: WEIGHT OF EVIDENCE. Evidence examined and *held* to sustain the verdict, and there is no material error in the instructions.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Marston & Nevius, for plaintiffs in error.

R. A. Moore, pro se.

MAXWELL, CH. J.

The defendant in error brought an action against the plaintiffs in error and set forth his cause of action as follows: "The plaintiff claims of and from the defendants the sum of \$325, and for cause thereof alleges that some time during the month of September or October, 1888, he purchased of and from the defendants a piano for the sum of \$525, and plaintiff avers that, as an inducement for him to make said purchase, one ———, agent of defendants, represented to him that the piano in question was worth \$600, and that he had never sold one for less than \$600, and they could not be purchased for less than said amount, and that he had sold one exactly like it to G. B. Finch for \$600; that this piano should be as good in every respect; that the piano so bought was a Fischer piano known as the 'Baby Grand'; that the said agent represented to plaintiff that said piano was of a superior make and a much better grade of piano than the Hardman or other pianos; he also represented to the plaintiff that he could take said piano, and if it did not prove entirely satisfactory to plaintiff after trial, they would take it back and furnish

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him with another instrument worth the money; that plaintiff was not a judge of pianos and so informed the defendant, and that he would rely on them furnishing him an instrument that was all right and worth the money. The said defendants further represented to plaintiff that they would warrant said instrument for five years; that it should be all right in every particular. Plaintiff avers the fact to be that said instrument was not as represented, in this, that it was not worth more than \$200; that the said defendants have been selling said instruments for three or four hundred; that it is not worth more than half as much as the one he sold C. B. Finch; that the said piano is of an inferior grade and not near as good a piano as the Hardman and others of the same kind; that the piano was not satisfactory to plaintiff, and he so informed defendants numerous times and asked them to take it back and furnish him with another instrument worth the amount of money paid by plaintiff; that the plaintiff bought the piano for his daughter upon the express representation that it was of a superior make, and the same has been out of repair for the full year since he bought it; that he has notified the defendants several times that it was out of repair and they have sent an agent several times to fix it, but each time when it was repaired it would not remain in repair more than a few days, and that the same is not worth more than \$200; wherefore plaintiff, on account of the matter and things hereinbefore, has been damaged in the sum of \$300, no part of which has been paid, with costs of suit."

The defendants below in their answer admit the purchase of the piano and that it was to be as good as the one sold to Finch, and deny all other allegations.

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$250, and a motion for a new trial having been overruled, judgment was entered on the verdict.

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Two points are relied on for a reversal of the judgment: First, that the verdict is against the weight of evidence, and second, error in the instructions. The proof does clearly establish the fact that the piano in question is not as good as the one sold to Finch, and that there should be a deduction, and in our view the amount allowed by the jury is none too large. The verdict, therefore, conforms to the evidence, and there is no material error in the instructions. The judgment is therefore

AFFIRMED.

THE other judges concur.

DAVID NEHR V. STATE OF NEBRASKA.

[FILED NOVEMBER 10, 1892.]

1. **Property in Dogs.** In this state a dog has a money value which the owner may recover from one who wrongfully and unlawfully kills his dog.
2. **Dogs: COLLAR.** It is the duty of the owner to place upon the neck of his dog "a good and sufficient collar with a metallic plate thereon, on which shall be plainly inscribed the name of the owner." If a dog is found running at large without such collar, no action can be maintained for killing the dog.
3. ———: **RUNNING AT LARGE.** When a dog leaves the owner's premises or goes upon the public road, no one having control of him being near, he is running at large within the meaning of the statute.
4. ———: **NUISANCE.** A dog that persistently assails people passing along a public road in a threatening manner is a nuisance, and may be killed by any person so assailed.

ERROR to the district court for Gage county. Tried below before **BABCOCK, J.**

Hardy & Wasson, for plaintiff in error:

It is lawful for a person to kill any dog found running at large, on whose neck there is no collar, and no action can be maintained for such killing. (Sec. 191, Consolidated Statutes.) The dog was unconfined and unrestrained, and was therefore "running at large." (*Commonwealth v. Dow*, 10 Met. [Mass.], 382; *Woolf v. Chalker*, 31 Conn., 121; *Mo-Aneany v. Jewett*, 10 Allen [Mass.], 151.) A dangerous and unruly dog running at large is a nuisance, and the killing of such an animal is justifiable. (*Putnam v. Payne*, 13 Johns. [N. Y.], 312; *Maxwell v. Palmerton*, 21 Wend. [N. Y.], 408.) The dog was of no intrinsic value, and was not such personal property as made it a crime to kill him. (*United States v. Gideon*, 1 Minn., 226; *Jemison v. S. W. R. Co.*, 75 Ga., 444; *State v. Marshall*, 13 Tex., 55.)

George H. Hastings, Attorney General, contra:

Dogs are personal property within the meaning of the statute. (*Hinckley v. Emerson*, 4 Cow. [N. Y.], 351; *Parker v. Mise*, 27 Ala., 481; *Wheatley v. Harris*, 4 Sneed [Tenn.], 468; *Harrington v. Miles*, 11 Kan., 480; *Dunlap v. Snyder*, 17 Barb. [N. Y.], 561; *Brent v. Kimball*, 60 Ill., 211; *Uhlein v. Cromack*, 109 Mass., 273.)

MAXWELL, CH. J.

The plaintiff in error was informed against in the county court of Gage county because he did unlawfully, maliciously, and willfully shoot and kill a certain house dog, the property of John A. Dobbs, of the value of \$50. He was found guilty in the county court and appealed to the district court, where he was again found guilty, and the jury also found that the dog was of the value of \$1; and the plaintiff in error was sentenced to five days' imprisonment in the county jail and to pay a fine of \$2 and the costs.

The prosecution was instituted under section 109 of the

Criminal Code, which is as follows: "If any person shall willfully and maliciously injure or destroy to any amount less than one hundred dollars, any personal property of any description whatsoever, or any building or other structure of any kind, owned by another person, every person so offending shall be imprisoned in the jail of the proper county not exceeding thirty days, and shall, moreover, be fined in double the amount of the damage of the property injured or destroyed."

Section 191, Consolidated Statutes, provides: "It shall be the duty of every owner or owners of any dog or dogs to securely place upon the neck of such dog or dogs a good and sufficient collar with a metallic plate thereon, on which shall be plainly inscribed the name of such owner. It shall be lawful for any person to kill any dog found running at large, on whose neck there is no collar, as aforesaid, and no action shall be maintained for such killing.

"Sec. 192. Every person who shall harbor about his or her premises a collarless dog for the space of ten days shall be taken and held as the owner, and shall be liable for all damages which such dog shall commit.

"Sec. 193. The owner or owners of any dog or dogs who shall permit the same to run at large for ten days after this act shall take effect, without such collar as hereinbefore described being securely placed upon the neck of such dog or dogs, shall be deemed guilty of a misdemeanor and fined in any sum not exceeding twenty-five dollars, which, when collected, shall be paid to the county treasury for the benefit of the school fund of the county in which the fine was imposed."

The testimony shows that Mr. Dobbs's house was about 100 feet from the public road; that there was no fence between the house and the road; that the dog was in the habit of running out on the road when persons or teams were passing, and barking furiously; that he had run out in a belligerent manner nearly every time that the plaintiff

in error had passed along the road and at one time had frightened his team when his wife was driving. Other witnesses testify that their horses had been frightened by the dog. All the witnesses agree that the dog was in the habit of going on the road and barking in a threatening manner at teams or persons as they passed.

Jacob Dell, a witness called by the defendant, testified:

Q. Did you know John Dobbs's dog?

A. Yes, sir.

Q. The one that was shot?

A. Yes, sir.

Q. Tell what you know about his attacking you going by there.

A. Well, when I came past with a team he nearly always came out in a vicious, severe manner, just as though he intended to eat something up if he could get hold of it; first, my team isn't easily scared; he didn't scare the team very much; he always tackled me when I went by on foot, he came out very savagely; he came out within three or four feet of me; I knew the dog was going to bite me; I turned around and kicked at him; he barked and growled; he is as cross as any dog I had to encounter; he followed me three or four rods and then he turned back.

Q. Did he put you in fear?

* * * * *

Q. State what effect this attack had upon you and your mind, at this particular time; I allude to the time of the attack.

A. I don't know that it had any effect, only that it scared me.

Q. What were you scared about?

A. I was afraid he was going to bite me.

Other witnesses testify to substantially the same facts.

The testimony also shows that the dog came out on the road when the plaintiff in error was passing that place and commenced barking in a hostile manner, whereupon the plaintiff in error shot and killed the dog.

The first objection is, that a dog has no value, and therefore a prosecution will not lie under the statute in question. We think differently, however. A dog is property and no one can destroy it maliciously without making himself liable. (*Harrington v. Miles*, 11 Kan., 480; *Hinckley v. Emerson*, 4 Cow. [N. Y.], 351; *Uhlein v. Cromack*, 109 Mass., 273; *Brent v. Kimball*, 60 Ill., 211.) The first objection, therefore, is untenable.

Second—The design of the statute is that all dogs shall wear collars, so that it shall be known who the owners are. If a dog is found on the public road without a collar and away from his owner or the person having charge of him, the statute in effect authorizes the destruction of the dog.

But it is said the dog was not running at large when he was killed. The words "running at large," in the connection in which they are used, mean running on the public road or off from the owner's premises without any person claiming an interest in the dog being near at hand.

In *Commonwealth v. Dow*, 10 Met. [Mass.], 382, it was held that a dog is going at large in a town if he is loose and following the person who has charge of him at such a distance that he cannot exercise control over the dog.

In *McAneany v. Jewett*, 10 Allen [Mass.], 151, the dog was on the owner's premises, disturbing no one when the defendant entered thereon and shot the dog, and it was held that the dog was not at large.

In *Loomis v. Terry*, 17 Wend. [N. Y.], 496, it was held that if a person permit a mischievous dog to run at large on his premises and a person is bitten by him in the daytime the owner will be liable for the damages, although the person injured was trespassing on the ground of the owner at the time. It is made the duty of the owner to put a collar on his dog, so that his ownership may be known. If he fails to do so and the dog is killed, off from the owner's premises, there can be no recovery.

Third—The testimony would warrant the jury in find-

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ing that the dog was in the constant habit of attacking people passing along the public road and therefore was a nuisance, and justified any person assaulted in killing him.

An attempt was made to show that other dogs attacked people in passing along the roads. Even if proved, it would not aid this case. (*Maxwell v. Palmerton*, 21 Wend. [N. Y.], 408.) In the case cited Chief Justice Nelson says: "If a dog be in fact ferocious, at large, and a terror to the neighborhood, the public would be justified in dispatching him at once." The same statement had previously been made in *Putnam v. Payne*, 13 Johns. [N. Y.], 312, and is no doubt the law.

No person has a right to keep a dog that persistently assails travelers passing peaceably along the public road, and the fact that many persons permit their dogs to do so does not justify the practice. In any view of the case, therefore, the judgment cannot be sustained. The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE K. MOREHOUSE V. STATE OF NEBRASKA.

[FILED NOVEMBER 10, 1892.]

1. **Embezzlement: FRAUDULENT PLEDGING OF PROPERTY BY COMMISSION AGENT.** An agent who, having received property of another to sell on commission on certain prescribed terms, fraudulently, and without the knowledge and consent of the owner thereof, pledges it for money borrowed by the agent for his own use and benefit, with the intent to deprive the owner of his property, is guilty of embezzlement.
2. ———: **EVIDENCE** in this case examined, and *held* sufficient to warrant a conviction for that offense.

· ERROR to the district court for Douglas county. Tried below before ESTELLE, J.

George S. Smith, for plaintiff in error.

George H. Hastings, Attorney General, contra.

NORVAL, J.

Plaintiff in error was tried and convicted in the court below upon an information charging him with the embezzlement of six pianos, of the value of \$1,370, all being the property of Chickering, Chase Bros. & Co., a Chicago corporation. From the judgment of the court, requiring him to be imprisoned in the penitentiary at hard labor for the term of four years, he prosecutes error to this court.

Numerous errors are assigned in the motion for a new trial, and in the petition in error, but one of which is now relied on for a reversal, namely, that the verdict is against the evidence. It appears from the testimony in the bill of exceptions that plaintiff in error was engaged in the sale of musical instruments in the city of Omaha; that on the 17th day of December, 1890, he entered into a written contract with Chickering, Chase Bros. & Co., a corporation doing business in Chicago, for the sale, on commission, of pianos owned and handled by said corporation, as its agent. By the terms of the contract, all goods furnished by the company were to be held by Morehouse upon consignment and were to be sold on such terms as the company should direct. All moneys, notes, or other property received from the sale of instruments were to belong to the company. All notes and leases for instruments were to be taken on blanks furnished by the company, payable to its order, secured by lien on the instruments sold, and subject to the company's approval. The instruments were to remain the property of the company until they were sold, and instruments taken back from customers on account of default in

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payments, or for other causes, and all new or second-hand instruments taken in exchange, or in part payment for instruments consigned by the company were to be regarded as goods consigned, and to be accounted for in the same manner. Morehouse was to report on the first day of each month all instruments received and sold, as well as those remaining on hand unsold, and was to make prompt returns as sales were made. The agency was to be terminated at any time by either party, and all instruments at such time remaining unsold were to be delivered free of charge or expense of any kind to the company upon demand. Morehouse was to receive as commission for his services such sum or sums as he should sell the instruments consigned to him for in excess of the invoice prices.

It further appears that under said contract six pianos of the value of \$1,370 were shipped by the company to plaintiff in error in the month of December, 1890, and the same were received by him at his place of business in Omaha. Subsequently, on the 3d day of January, 1891, Morehouse executed and delivered a bill of sale on five of the instruments to one C. F. Orff, to secure the payment of a loan of money. The other piano, No. 3,633, was taken by plaintiff in error to his residence, and afterwards, on the 12th day of January, 1891, he made and delivered to one C. De Roberts a bill of sale thereof to secure a pre-existing indebtedness and the payment of the further sum of \$50 at the time borrowed of De Roberts. Each bill of sale was given without the knowledge or consent of the corporation, and it did not receive any of the moneys for the payment of which they were given to secure. Each recited in the body thereof that the property therein described belonged to Morehouse.

It is conceded that after the giving of said bills of sale, and while said agency contract was in full force, Morehouse formed a partnership with one Charles E. Morrill, and for a time the business was carried on under the firm

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name of Morehouse & Morrill, although the contract of agency remained unchanged and in the name of Morehouse. With the money received from Morrill for a half interest in the enterprise, Morehouse paid off all the indebtedness for which the pianos had been pledged as security, except the indebtedness to De Roberts, which has never been paid. It also appears from the testimony that on the 5th day of March, 1891, plaintiff in error sold his interest in the partnership to his partner Morrill, and at the time gave him a bill of sale covering the six pianos in controversy and other property, by the terms of which, and as a part consideration for the giving of the same, Morrill agreed and assumed to pay certain specified indebtedness of the firm, amounting to \$1,065.85. A portion, if not all, of such indebtedness has since been paid by Morrill. There is no conflict in the testimony as to any of the facts above stated. The state also introduced evidence which tended to show that Morehouse represented to Morrill prior to the giving of the last bill of sale that he was the owner of the pianos and had paid for the same; that he exhibited to Morrill a forged receipted bill of the instruments, which purported to be signed by Chickering, Chase Bros. & Co., and that plaintiff in error also opened an account upon his books with the company, in which he charged himself with the six pianos at \$1,370 and credited himself with cash \$1,370, although he had never paid any part of said sum. Morrill admits making the receipted bill of the instruments as well as the entry upon his books of the cash payment above mentioned, but claims that he entered the same through mistake; but his explanation is entirely unsatisfactory. He testified that the credit should have read, "goods," instead of "cash," yet upon cross-examination he admits that he had never returned any goods to the company. The evidence shows that five of the pianos, the company, through a compromise with Morrill, has recovered back, but that it has never received the one pledged to

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De Roberts, which had been taken by him under his bill of sale, and its whereabouts is unknown to the company.

In the brief of counsel for plaintiff in error it is urged that the bill of sale given to Morrill was obtained by duress and threats made by the latter, but we find no foundation for such claim in the evidence. Morehouse in his testimony makes no claim that he was induced by threats to make the bill of sale, but insists that he gave it for the purpose of placing his property beyond the reach of his creditors, in which statement he is contradicted by Morrill. The evidence contained in the bill of exceptions tends to prove that plaintiff in error claimed to be the absolute owner of the instruments in question; that he received the same as the agent of Chickering, Chase Bros. & Co., and that he converted the property to his own use with a fraudulent intent, by pledging the same for money borrowed, and by transferring the pianos by a bill of sale to Morrill. The fraudulent and wrongful pledging of the instruments by plaintiff in error for money borrowed and to secure the payment of his own indebtedness, without the consent of the owner, amounts in law to embezzlement. (*Commonwealth v. Butterick*, 100 Mass., 1; *Commonwealth v. Tenney*, 97 Id., 50.) The fact that the company finally received back some of the instruments does not relieve the act of its criminal nature. We are of the opinion that the evidence sustains the verdict. The judgment of the district court is

AFFIRMED.

THE other judges concur.

JOHN STABLER ET AL. V. HENRY GUND ET AL.

[FILED NOVEMBER 10, 1892.]

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| 35 | 648 |
| 40 | 306 |
| 41 | 681 |
| 41 | 693 |

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| 35 | 648 |
| 44 | 147 |

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| 35 | 648 |
| 45 | 297 |
| 45 | 341 |

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|----|-----|
| 35 | 648 |
| 51 | 188 |
| 54 | 226 |
| 55 | 19 |
| 55 | 162 |
| 55 | 739 |

| | |
|----|-----|
| 35 | 648 |
| 57 | 411 |

| | |
|----|-----|
| 35 | 648 |
| 60 | 446 |

1. **Review: FAILURE TO FILE BRIEFS: SUBMISSION OF CAUSE WITHOUT ARGUMENT.** Where a cause brought to this court upon appeal or petition in error is submitted upon the record and bill of exceptions without either a brief or oral argument, the judgment, ordinarily, will be affirmed without an investigation of the questions presented.
2. **Conditional Order for Payment of Money: ACTION AGAINST ACCEPTOR: PLEADING.** In an action by a payee against the acceptor of a conditional order for the payment of money, the plaintiff must aver and prove that the conditions stipulated in the order have been fulfilled in order to entitle him to recover.
3. **Trial to Court: HARMLESS ERROR: THE ADMISSION OF ILLEGAL EVIDENCE** in a cause tried to a court without a jury is not sufficient ground for the reversal of the judgment.

ERROR to the district court for Phelps county. Tried below before GASLIN, J.

Hall & Patrick, for plaintiffs in error.

Case & McNeny, contra.

NORVAL, J.

Plaintiffs in error were engaged in business under the name of the Nebraska Manufacturing Company, and defendants in error were engaged in the banking business under the name and style of the Webster County Bank. On the 15th day of December, 1884, the firm of Schunk & Mouser, composed of J. Schunk and L. D. Mouser, was indebted to plaintiffs in error for goods, wares, and merchandise sold and delivered, to the amount of several hundred dollars, a part of which indebtedness was evidenced by four promissory notes, and the balance was on

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book account. For the purpose of securing the payment of such indebtedness, Schunk & Mouser executed and delivered to plaintiffs the following order :

“BLUE HILL, NEB., Dec. 15, 1884.

“*Webster County Bank, Blue Hill, Neb.*

“Please pay to the Nebraska Manufacturing Co., of Lincoln, Nebraska, the amount we owe them, consisting of the following notes and book account, out of the first collaterals you hold belonging to us, after the amount we owe you is paid: [Here follows a description of the four notes and the account.] Amounting in all with interest to about \$598.

SCHUNK & MOUSER.

“J. SCHUNK.

“L. D. MOUSER.

“Witness : E. L. MORSE.”

Upon the face of said order is written the following acceptance: “December 15, 1884. Accepted. Webster Co. Bank, E. L. Morse, Asst. Cashier.”

Action was brought in the court below upon said acceptance, the plaintiffs alleging that at the time of the giving of said order and the acceptance thereof, defendants had in their possession and under their control a large number of notes, accounts, and securities belonging to the firm of Schunk & Mouser, which were held by the bank as collateral security for money due from said firm to the defendants; that said indebtedness to said bank has since been paid, and that defendants have in their possession a large amount of notes, accounts, and securities belonging to said Schunk & Mouser, over and above the indebtedness of said firm to the bank. The prayer is for judgment for \$498 and interest. The answer to the petition is, in effect, a general denial. There was a trial to the court, with finding and judgment for the defendants.

The cause is submitted to this court upon the record and bill of exceptions, without either brief or oral argument to aid us in reaching a proper conclusion. This court is bur-

dened with business, and counsel bringing cases here for review should file briefs of the points and authorities relied upon for a reversal of the judgment. A case that does not possess sufficient merit to demand the filing of briefs is of too little importance to occupy the time of the court in its consideration, and in the future such cases, ordinarily, will be affirmed without an investigation of the questions presented.

The first assignment in the petition in error, that the judgment is not sustained by sufficient evidence, must be overruled. The order directing the bank to pay the indebtedness of the drawers to plaintiffs was conditional and not absolute. It was to be paid out of the first moneys arising from the collection of the collaterals held by the bank belonging to the drawers after their indebtedness to the bank was liquidated. There is not a syllable of testimony tending to show that any sum has been paid upon the collaterals in excess of the claim of the bank, for the payment of which they were held as security. Clearly such proof was necessary to establish the liability of the defendants. By their acceptance of the order they only agreed to pay the amount collected by them in excess of the sum due them from the drawers. Not only is there a failure of proof, but the petition fails to state a cause of action, in that it contains no averment that anything has been collected upon the collaterals by the bank in excess of the amount due it from Schunk & Mouser.

Complaint is made because the court permitted defendants to prove that they held no collaterals belonging to the drawers of the order at the time the same was given, nor since. We think this testimony was inadmissible because it tended to impeach or contradict the written order, by the acceptance of which defendants admitted that they held in their possession securities owned by Schunk & Mouser. They were estopped to deny the recitals in the order. While the testimony to which we have referred was im-

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properly received, the judgment for that reason will not be reversed. Had it been excluded it could not have changed the result, therefore was not prejudicial to the plaintiffs. Again it has been often held by this court that the admission of irrelevant testimony in a cause tried to a court without a jury is not ground for the reversal of the judgment. (*Enyeart v. Davis*, 17 Neb., 228; *Ward v. Parlin*, 30 Id., 376.)

The third ground in the petition in error is "errors of law occurring at the trial duly excepted to." This is too general to be considered. It is a sufficient assignment in a motion for a new trial, because made so by statute, but in a petition in error the grounds upon which it is asked that the judgment be reversed must be specifically stated. The judgment is clearly right and is

AFFIRMED.

THE other judges concur.

DE LANE A. WILLARD V. JENS C. NELSON.

[FILED NOVEMBER 10, 1892.]

1. **Promissory Note: FRAUD IN PROCURING SIGNATURE: BONA FIDE PURCHASERS.** When the signature of an illiterate person is obtained to a promissory note by the payee fraudulently inducing him to believe that he is signing an instrument of an entirely different character, without any fault or negligence of the maker, the note cannot be enforced even in the hands of a *bona fide* holder.
2. **Sufficiency of Evidence.** *Held*, That the instructions fairly presented the case to the jury, and that the verdict is not contrary to the evidence.

ERROR to the district court for Platte county. Tried below before SMITH, J.

Willard v. Nelson.

M. V. Moudy, and Sullivan & Reeder, for plaintiff in error.

M. Whitmoyer, contra.

NORVAL, J.

This is an action to recover of the defendant in error the amount of a promissory note for the sum of \$120, which it is alleged he executed at Columbus, this state, on the 26th day of October, 1887, payable to the order of Cole, Grant & Co. one year after date, with interest at ten per cent, and indorsed by the payees to the plaintiff before maturity.

The answer sets up the illiteracy of the defendant, want of consideration, and that the note was procured by fraud and circumvention practiced upon him by the agent of Cole, Grant & Co. The reply denies the allegations of the answer. The jury found for the defendant, and the plaintiff brings error.

On the trial the plaintiff introduced testimony tending to show that the defendant's genuine signature is attached to the note and that plaintiff purchased it for value before maturity. He also introduced the instrument in evidence, and then rested his case. Thereupon the defendant introduced testimony to the effect that in October, 1881, he met in Columbus a person who represented himself to be the agent of Cole, Grant & Co. in the sale of a certain combination slat and wire fence; and that defendant was induced to and did consent to act as agent for said Cole, Grant & Co. in the sale of such fence in certain townships of Platte county. A commission contract, partly written and partly printed, constituting and appointing the defendant as such agent, was prepared by the agent of Cole, Grant & Co., which was signed by both parties. The defendant further testified that he signed his name but twice on that occasion, and he supposed he was signing duplicate contracts; that he is illiterate and unable to read English; that the stran-

ger read over the contract to him before it was signed; that nothing was said at any time about the defendant giving a note, nor did he know that he had signed one until long after the agent of the payees had left the county. This testimony is undisputed. The uncontradicted proof shows that, while the defendant's genuine name is appended to the note, he never executed and delivered the same, knowing it to be such, but that by some artifice or trick he was duped and defrauded into signing it, supposing it to be an agency contract for the sale of the fence. The note was absolutely without consideration. Only the two parties to the transaction being present when the paper was signed, the defendant was compelled to trust to the reading thereof to the agent of the payees. Whether the defendant was guilty of negligence or not was for the jury to determine from all the facts and circumstances in evidence. If he was free from negligence or fault and was tricked into signing the note, as the jury must have found, and the evidence tends to show, then the plaintiff cannot recover, although he may be a *bona fide* holder. (*First National Bank of Omaha v. Lierman*, 5 Neb., 247; *Dinsmore & Co. v. Stimbert*, 12 Id., 433; *First National Bank of Sturgis v. Deal*, 22 N. W. Rep. [Mich.], 53; *Bowers v. Thomas*, 62 Wis., 480; *Soper v. Peck*, 51 Mich., 563.)

The plaintiff on rebuttal called as a witness one Gus Wilson, and propounded to him the following question:

Q. State if Mr. Willard applied to you, about the time this note was purchased by him, to ascertain if he knew anything about the genuineness of this signature before he purchased.

Objected to, as immaterial and not responsive to the issues, and not rebuttal. Sustained. Exception.

The plaintiff offered to prove by the witness that within four or five days after October 26, 1887, the plaintiff in the action, D. A. Willard, came to the witness at his bank in Genoa, Nebraska, and asked him concerning the note

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in suit, and the responsibility of the defendant, and exhibited to the witness the instrument, asking him whether it was all right; that the witness then stated to plaintiff that the signature to the note was genuine and that the defendant was financially solvent. Defendant objected to the offer, which was sustained.

The offered testimony was excluded, and, we think, rightly so, as it was clearly immaterial. The answer admitted the signature to the note, and the jury were so instructed. Besides, it was not competent to prove what the witness said to plaintiff about the note before it was purchased, as such testimony had no bearing upon the issues in the case, and was hearsay.

Several exceptions were taken to the charge of the court as given, and the refusal to give instruction one, requested by the plaintiff. None of these are well taken. Counsel have not pointed out a single objection to the charge of the court, and we are unable to discover any error therein. The instructions are in harmony with the authorities cited above, and the case went to the jury under a charge quite as favorable to the plaintiff as the case would warrant. The verdict has ample support in the evidence, and finding no error in the record the judgment of the district court is

AFFIRMED.

THE other judges concur.

O. D. MONTGOMERY, MODERATOR, v. STATE OF NEBRASKA, EX REL. ELMER E. THOMPSON, COUNTY SUPERINTENDENT.

[FILED NOVEMBER 10, 1892.]

1. **Mandamus: MODERATOR OF SCHOOL DISTRICT: REFUSAL TO COUNTERSIGN ORDERS.** It is the duty of the moderator of a school district to countersign all proper orders drawn by the director on the district treasurer, and if he refuses to countersign such an order, issued in full compliance with the provisions of law, *mandamus* will lie to compel the performance of such duty.
2. ———: ———: **RIGHT OF COUNTY SUPERINTENDENT TO APPLY FOR WRIT.** A moderator refused to countersign an order properly drawn upon the treasurer and the matter was submitted for adjudication to the county superintendent, who, after investigation, found that the officer refused to sign the order for insufficient reasons. *Held*, That under the statute the county superintendent had the right, on behalf of the district, to apply to the proper court for a writ of *mandamus* to compel the officer to perform his duty.
3. **Employment of Teacher: VALIDITY OF CONTRACT.** A contract of employment of a teacher entered into on behalf of the district by the director and treasurer will bind the district, although the moderator was not consulted concerning the employment.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Thummel & Platt, for plaintiff in error.

Charles G. Ryan, contra.

NORVAL, J.

This action was brought in the court below by the state, on the relation of the county superintendent of schools of Hall county, for a peremptory *mandamus* to require and compel the plaintiff in error, as moderator of school district

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No. 27, of said county, to sign certain school orders drawn by the director of said district upon the school district treasurer in payment of teachers' wages. An alternative writ of *mandamus* was issued, to which the respondent filed a motion to quash on the following grounds:

1. Plaintiff has no legal capacity to sue.
2. Defect of parties plaintiff.
3. The facts alleged are insufficient to entitle the relator to the relief demanded.

The motion being overruled, respondent answered, and upon the hearing the issues were found in favor of relator and a peremptory *mandamus* was granted as prayed. A motion for a new trial was made and denied. To reverse the judgment the cause is brought into this court on error.

The facts alleged and proved are substantially these: On or about the 29th day of July, 1889, James Bly and Nelson Wescott, the director and treasurer respectively of school district 27 of Hall county, entered into a written contract on behalf of said district with one Katie E. Costello, a legally qualified teacher of said county, by which she was employed to teach the school of said district for the period of six months, commencing on the 2d day of September, 1889, at an agreed salary or wages of \$37.50 per month, payable at the end of each month.

In pursuance of said contract said Costello taught the school of said district for the full term of six months, and in part payment for the services so rendered as such teacher, the said James Bly, as director of said school district, drew two orders upon the treasurer of said school district in favor of said Costello, one for the sum of \$37 and the other for \$38. Both of these orders, after being duly signed by said Bly as director, were presented to the respondent, the moderator of the said school district, with a request that he countersign the said orders, which request he refused to comply with. Thereupon the matter of the refusal of the respondent to countersign said orders was

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submitted for adjudication to the relator, as county superintendent, who, after investigation, found that the respondent, through contumacy, unreasonably refused to countersign said orders. The respondent still refusing to countersign the same, although the county superintendent presented the orders to him with a request that he sign the same, the relator instituted this action.

Section 16, subdivision 4, chapter 79, Compiled Statutes, provides that the director "shall draw and sign all orders upon the treasurer for all moneys to be disbursed by the district, and all warrants upon the county treasurer for moneys raised for district purposes, or apportioned to the district by the county superintendent, and present the same to the moderator, to be countersigned by him, and no warrant shall be issued until so countersigned. No warrant shall be countersigned by the moderator until the amount for which the warrant is drawn is written upon its face. The moderator shall keep a record, in a book furnished by the district, of the amount, date, purpose for which drawn, and name of person to whom issued, of each warrant countersigned by him."

By the above statutory provision it is made the duty of the moderator of a school district to countersign all proper orders drawn and signed by the director upon the district treasurer for moneys to be disbursed by the district. The treasurer of a school district has no authority to pay out moneys belonging to the district, except upon orders signed by the director and countersigned by the moderator. (Section 5, subdivision 4, of said chapter 79; *State v. Bloom*, 19 Neb., 562.)

It is urged that relator has no capacity to sue, and that there is a defect of parties plaintiff. We think ample authority for bringing the action is conferred upon the relator by section 11, subdivision 3, chapter 79, Compiled Statutes, which provides that "whenever a director or moderator refuses to sign orders on the treasurer, or

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the treasurer thinks best to refuse the payment of orders drawn upon him, the difficulty shall be referred for adjudication to the county superintendent, who shall proceed at once to investigate the matter, and if he finds that the officer complained of refuses, through contumacy or for insufficient reasons, it shall be the duty of the superintendent on behalf of the district to apply to the proper court for a writ of *mandamus* to compel the officer to perform his duty."

The language of the section quoted is clear and explicit, and leaves no room for interpretation. In the case at bar the petition, as well as the proof, shows that the matter of the refusal of the respondent to countersign the warrants in question was submitted to the relator as county superintendent, and, upon investigation, he found that respondent refused to countersign the orders without his having any valid ground or excuse therefor. Such being the case, the right of the county superintendent to apply to the court for a *mandamus* to compel the respondent to countersign the orders cannot be doubted. Notwithstanding the power thus conferred upon the county superintendent by the statute, Miss Costello could have brought the action in her own name, yet she was not obliged so to do, nor was it necessary that she should have been joined as a relator herein. The fact that a third party advanced the money on the orders to the payee therein named did not bar the right of the county superintendent to institute the suit, nor was the person so advancing the money a necessary party to the action. It fully appears from the record before us that the application for *mandamus* was brought by the relator on behalf of the school district. This was sufficient.

The objection that relator failed to prove that Miss Costello was a qualified teacher is not sustained by the record. The bill of exceptions shows that during the time she taught the school she held a second grade certificate from the county superintendent of Hall county, authorizing her

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to teach school in such county. She therefore possessed a proper certificate of qualification, and the respondent's refusal to countersign the warrants upon that ground is without merit.

Upon the trial some evidence was introduced by respondent tending to show that the moderator took no part in the employment of the teacher, and that he neither had notice of or participated in the meeting of the school district board at which she was employed. The evidence established that the respondent was consulted by the other two members of the board concerning her employment, and that he declined to hire her at a compensation exceeding \$30 per month. It is immaterial that there was no formal meeting of the board authorizing her employment or that respondent did not consent to the making of the contract. The employment is not for that reason invalid. As stated by the present chief justice in his opinion in *Russell v. State*, 13 Neb., 68, "the director, with the assent of either the moderator or treasurer, may hire teachers, or if the moderator and treasurer agree upon a teacher they may require the director to employ the person agreed upon, or in case of his refusal undoubtedly may themselves employ such person. In order to secure harmony in the district, it is desirable that all those entrusted with the duty of hiring teachers should agree upon the person to be employed, but it is not necessary to the validity of the contract. The law imposes upon the director the duty of hiring, either at the request of his colleagues or with the assent of one of them. The law having specially authorized the director to perform this duty, it is not necessary to the validity of the contract that there should be a meeting of the school board, or even that all the members thereof should be consulted in relation thereto or notified of the employment." The contract entered into by a majority of the board on behalf of the school district is valid and binding. And as it appears that the respondent failed to perform a plain statutory

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duty, the district court did not err in awarding a peremptory writ of *mandamus* to compel him to perform such duty. The judgment is

AFFIRMED.

THE other judges concur.

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LEIGH R. FLETCHER V. RANDALL A. BROWN.

[FILED NOVEMBER 10, 1892.]

1. **Joinder of Actions: EJECTMENT: RENTS AND PROFITS.** An action of ejectment, under our practice, may be joined with one to recover rents and profits.
2. **Ejectment: RENTS AND PROFITS: LIMITATIONS: OCCUPYING CLAIMANTS ACT.** Damage for rents and profits may be recovered in an action of ejectment for the statutory period, prior to the service of summons therein. The special provision of the occupying claimants act, ch. 63, Compiled Statutes, applies only to rents and profits subsequent to the service of summons in the ejectment suit.
3. ———: **REMEDY FOR RENTS AND PROFITS ACCRUING AFTER SERVICE OF PROCESS.** Whether such special provision is exclusive as to damages for rents and profits subsequent to the service of summons in ejectment or concurrent only, *query*.
4. ———: **OCCUPYING CLAIMANT: VALUE OF IMPROVEMENTS: EVIDENCE.** Where an occupant of real estate, in an action of ejectment, is allowed for valuable and lasting improvements made while in possession under a claim of title, the measure of his recovery is the amount such improvements add to the value of the premises. Evidence of the cost of improvements, irrespective of their effect upon the value of the land, is inadmissible.
5. **Evidence: TAXES PAID BY THIRD PARTY.** Evidence examined, and *held* not sufficient to entitle the plaintiff in error, defendant in an action of ejectment, to recover for taxes paid by third parties.
6. ———: ———. One F. went into possession of property under a title bond executed by L., whereby the latter agreed to convey

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by good and sufficient deed upon the payment of the last installment of the purchase money ten years after date. Subsequently, and before payment of the purchase money, B. brought an action of ejectment against F. to recover possession of the premises. *Held*, That F. could not recover against B. for taxes paid by L. in the absence of evidence of a special assignment by the latter.

7. **Occupying Claimants:** EVIDENCE examined, and *held* to sustain the finding of the trial court as to the value of improvements made by plaintiff in error, an occupying claimant.

ERROR to the district court for Washington county.
Tried below before HOPEWELL, J.

W. H. Eller, for plaintiff in error.

W. C. Walton, and *Charles H. Brown*, *contra*.

POST, J.

This was an action of ejectment in the district court of Washington county by the defendant in error, Randall R. Brown, to recover possession of the west half of the south-east quarter of section 21, township 19, range 11 east, in said county. The petition is in the usual form in actions of ejectment and praying judgment for damages in the sum of \$100. The answer is a denial of title in the plaintiff and an allegation of title in the defendant by virtue of two tax deeds by the treasurer of Washington county; one in favor of R. F. Beal and E. A. Allen, November 30, 1864, and the other to Victor G. Lantry, August 9, 1879. It is also alleged that the defendant and his grantors have paid taxes on the property in controversy since the year 1861, and that he and his immediate grantor, Lantry, have since the year 1876, while in possession thereof, made valuable and lasting improvements thereon, consisting of a dwelling house, stable, out-buildings, orchards, etc., to the value of \$2,400. The answer concludes with the prayer for an accounting, in case the title to the premises is found by the court to be in the plaintiff, and that the taxes paid

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by the defendant and his grantor may be adjudged to be a lien thereon, and for general relief. The reply is a general denial. The case being called for trial in the district court, the cause of action was confessed by the defendant below so far as the title to the property was concerned, and the following stipulation signed by the respective parties:

"It is hereby stipulated by and between the parties hereto, that at the April term of court this defendant (plaintiff) may take judgment in his favor for possession in this cause, * * * and that the question of rents, and profits, and improvements, and such other things and differences as are set up in defendant's answer or the defendant may have, shall be continued for settlement, or until the next term of this court."

Subsequently the case was sent to a referee with instructions "to take the evidence and report upon the facts and law as to the matters in issue undisposed of by the judgment heretofore rendered in this action, being the question, on the part of the plaintiff, for the recovery of damages for the rents and profits of the land described in his petition, and the question of the recovery by the defendant of damages for taxes paid and improvements made on the same."

At a subsequent term the referee submitted his report as follows:

"1. That defendant took a conveyance of the land from Victor G. Lantry by a bond for a deed, September 30, 1882.

"2. That defendant took possession of the land soon after and enjoyed the rents and profits of the same for the years 1883, 1884, 1885, 1886, and 1887.

"3. That the rental of the land was as follows: Forty-five acres worth \$2.00 per acre for each of the years 1883, 1884, 1885, and worth \$2.50 per acre for each of the years 1886 and 1887. Twenty-five acres worth 25 cents per acre for each of the years 1883, 1884, 1885, 1886, and 1887. The rest of the land had no rental value.

"4. That defendant placed on the land prior to February 23, 1883, and subsequent to September 30, 1882, lasting and valuable improvements of the value of \$825.

"5. That there was placed on the land by Victor G. Lantry, through whom defendant claims, and prior to defendant's purchase of the land, lasting and valuable improvements of the present value of \$250.

"6. That defendant placed on the land subsequent to February 23, 1883, lasting and valuable improvements of the present value of \$600.

"7. That payments of taxes for the land in controversy have been made, and instruments and documents have been made and delivered, as shown in the schedule hereto attached and made a part of this report, marked 'Exhibit A,' said schedule showing tax deeds, certificates of sale for taxes, quitclaim deeds, payment of taxes, one satisfaction of bond for a deed, one redemption certificate, and one bond for a deed.

"8. That owing to the failure to plead in the answer, or owing to the fact of too much land being covered by a tax deed, or want of proof of power of attorney, or want of proof of proper assignment of interest, defendant's interest in the land in the matter of taxes is not shown clearly, except for the years 1870, 1873, 1883, 1884, 1885, and 1886.

"I make the following conclusions of law:

"1. That plaintiff is entitled for rents and profits:

"For the year 1883 to \$96.25, with interest from January 1, 1884.

"For the year 1884 to \$96.25, with interest from January 1, 1885.

"For the year 1885 to \$96.25, with interest from January 1, 1886.

"For the year 1886 to \$118.75, with interest from January 1, 1887.

"For the year 1887 to \$118.75, with interest from January 1, 1888.

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“2. That defendant is entitled to the sum of \$1,075 in payment for lasting and valuable improvements put upon the land by himself and his grantor prior to February 23, 1883.

“3. That defendant is entitled to a lien for the taxes paid for the land for the years 1870, 1873, 1883, 1884, 1885, and 1886, as far as pleaded, with interest.”

Exceptions were taken to the above findings and conclusions of law by both parties, which sufficiently appear from the decree of the court as follows:

“This action coming on for hearing on the report of the referee and objections thereto filed by the plaintiff and defendant and arguments of counsel, and the court being advised in the premises, it is ordered that the first, second, and third exceptions of the plaintiff and also the defendant to the referee's finding of fact be, and the same are hereby, overruled, and the court approves the first, second, third, fourth, and fifth findings of fact by the referee; and it is further ordered that the said plaintiff's fourth exception to the referee's first conclusion of law be, and the same is hereby, reformed to the extent that the rents and profits of the land in controversy, amounting to the sum of five hundred and ninety-five dollars and eighteen cents, to the 10th day of April, 1888, and the said finding, as reformed, is hereby approved and confirmed. It is further ordered that the plaintiff's sixth objection to the referee's third conclusion is hereby disallowed and set aside; and it is further ordered that the fifth and seventh exceptions of the plaintiff to the referee's report be, and the same are hereby, overruled; and it is further ordered that the sixth, seventh, and eighth findings of fact by the referee be, and the same are hereby, disallowed and set aside as matters immaterial to the issues involved; and it is further ordered and adjudged that the referee's second conclusion of law be, and the same is hereby, approved and confirmed. It is therefore considered by the court that the plaintiff have and recover of and from the said defendant the possession of the prem-

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ises in the petition described, to-wit, the west half of the southeast quarter of section 21, in township 19, range 11 east, in Washington county, Nebraska, and that he have, and the clerk of the court is hereby ordered to issue, a writ of restitution for the possession of said premises upon the paying into the court by the plaintiff of the sum of four hundred seventy-nine dollars and seventy-two cents (\$479.72), being the difference between the sum found due the defendant, to-wit, one thousand seventy-five dollars for the improvements and five hundred and ninety-five dollars and eighteen cents rents and profits due the plaintiff, as shown by the report of the referee and its modifications by the court, with interest thereon from the 10th day of April, 1888, within ninety days from the entry of this judgment."

A preliminary inquiry is suggested by briefs of counsel, viz.: Just what issues were presented for trial before the referee? The allegation of the petition with respect to damage is probably too general and would have been so construed had objection been made at a seasonable time. The charge therein is that the plaintiff has sustained damage by the unlawful withholding of possession of said premises, in the sum of \$100, etc. Where damage is claimed for rents and profits the petition should contain a statement of the facts upon which such claim is based, although a general allegation is sufficient to support a judgment. (Boone, Code Pleading, 184.) But we must also look to the stipulation set out above and the order of the court for the issues. By them in express terms the whole question of rents and profits on one side and claim for taxes and improvements on the other side is submitted to the referee. Nor is the jurisdiction of the court or the regularity of its proceedings in that respect now called in question. The case therefore, as submitted to the referee for trial involved an accounting between the parties, and each was entitled to such relief as would have been allowed by the district court

as a court of equity had the same questions been, presented by the pleadings instead of the stipulations.

The first objection argued in this case is the allowance in favor of the plaintiff below of rent for the year 1883, which was prior to the service of any notice of his claim to the premises. This objection is founded upon the provisions of section 4 of the act approved February 28, 1883, known as the occupying claimants act. (Compiled Statutes, ch. 63.) By that section it is provided the appraisers contemplated by said act "shall assess the net annual value of the rents and profits which the occupant or claimant has received after having received notice of the successful claimant's title by service of process," etc. Had defendant in error elected to proceed in accordance with the provisions of the occupying claimants act it is clear that the inquiry of the appraisers with respect to rents and profits would have been confined to the period subsequent to the service of the summons. But, as we have already seen, the whole question of rents and profits was by stipulation submitted to the referee. The provision of the act of 1883 with respect to rents and profits is in substance identical with that of the former act on the subject. (Gen. Statutes ch. 51.)

In *Harrall v. Gray*, 12 Neb., 543, it was held that the last named act was not exclusive and that the plaintiff's damage for rents and profits was not limited to the time of the service of summons, but that he might recover in ejectment for such length of time, within four years, as the proofs show him entitled to. At common law the action of trespass for *mesne* profits could be maintained by the plaintiff in an ejectment suit after judgment in his favor, and the actions were so far separate that a judgment for nominal damage in the latter was no bar to a subsequent action for *mesne* profits. (*Van Alen v. Rogers*, 1 Johns. Cases [N. Y.], 281; *Jackson v. Wood*, 24 Wend. [N. Y.], 443.) But under the Code the two causes of action may

be joined. The occupying claimants act, however, makes no provision for assessing of damage for rents and profits *previous* to the service of summons. But that omission does not affect the plaintiff's right of recovery therefor. It is apparent that the act in question was not intended as a restriction upon the right of the plaintiff to recover in the ejectment suit his *meane* profits up to the time of service of the summons. Whether the special provision in the act aforesaid is exclusive or concurrent only, as to rents and profits subsequent to the service of summons, is a question not presented by the record in this case. There was therefore no error in allowing rents for the year in question.

2. The district court upon the exceptions of both parties reviewed the evidence and reduced the amount of the finding of the referee for improvements to \$1,075.72, which action is now assigned as error. It has been settled by repeated decisions of this court that an occupying claimant of land who has made lasting and valuable improvements thereon, under a *bona fide* claim of title derived from lawful public authority, is entitled to compensation therefor. (*Shuman v. Willetts*, 19 Neb., 705; *Page v. Davis*, 26 Id., 670.) In this connection it is important to determine, upon authority, the rule by which to assess the value of improvements in cases of this character. In 3 Sutherland on Damages, 349, 350, the rule is stated in the following language: "The improvements should be estimated in favor of the defendant at such an amount as they add to the market value of the premises." The same rule is stated by Judge Story in different language, viz., "the allowance must be measured by the benefits which the true owner will receive from the improvements." (Story's Eq. Jur., sec. 799; see also 1 Sedgwick, Damages, 258, note; *McMurray v. Day*, 70 Ia., 671; *Fisher v. Edington*, 85 Tenn., 23; *Thomas v. Quarles*, 64 Tex., 491; *Pacquette v. Pickness*, 19 Wis., 219.) Tested by the rule above stated, which we have no doubt is the sound one, there is no error

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in the ruling complained of. The referee had, over the objection of the plaintiff below, permitted the defendant to prove the cost of the improvements made by himself and Lantry through whom he claims, irrespective of their effect upon the value of the land. This evidence the court evidently rejected, since the amount allowed is about the average estimate of defendant's witnesses when examined with reference to the value of the land with and without the improvements. The finding of the court is clearly in accordance with the weight of evidence, and no sufficient reason is given for reversing it in this court.

3. The next contention is that the referee and the court erred in rejecting the claim of the defendant below for taxes for the years not enumerated in the referee's conclusions of law. The evidence of title in defendant is:

(1) Treasurer's deed, to Roger T. Beal and Edwin A. Allen, September 30, 1863.

(2) Treasurer's deed, to Roger T. Beal and Edwin A. Allen, November 21, 1864.

(3) Quitclaim deed, Beal and Allen to Victor G. Lantry, April 10, 1875.

(4) Treasurer's deed, to Rice Arnold, August 20, 1878.

(5) Treasurer's deed, to V. G. Lantry, August 9, 1876, for taxes of 1870.

(6) Treasurer's deed, to V. G. Lantry, August 9, 1876, for taxes of 1872.

(7) Quitclaim deed, Rice Arnold to defendant, March 31, 1888.

(8) Bond for a deed, Victor G. Lantry to Leigh R. Fletcher, defendant, dated September 30, 1882.

By the terms of the last named instrument Lantry agrees to sell and convey the property in controversy to the defendant for \$1,350, payable as follows: \$825 on January 15, 1883, \$400 five years after date, and \$125 ten years after date, all bearing interest at eight per cent per annum. It appears affirmatively from the evidence in the

bill of exceptions that no conveyance of the title to the property by Lantry to defendant has been attempted, nor is there any pretense that the latter has paid the amount named to entitle him to a deed. There is no evidence whatever of an assignment by Lantry to defendant of any claim for taxes, hence the rights of the latter, whether legal or equitable, must be referred to the title bond. There was therefore no error in rejecting the claim for taxes paid by Lantry. The judgment of the district court, so far as it recognizes the right of defendant to recover under the occupying claimants act, is evidently based upon the tax deed to Arnold, for it is plain that it could be sustained upon no other ground. Whatever may be the rights of Lantry with respect to taxes paid by himself or Beal and Allen, that cause of action, so far as this record discloses, remains his property.

The record discloses that the taxes from 1870 to 1882, inclusive of both years except for the year 1874, were paid by C. P. Lamar, S. S. Smith, and C. McMenemy, but we find in the record no assignment to defendant of the claim of either of the parties named, nor has plaintiff in error in his brief pointed out to us wherein any such privity exists as will entitle him to recover for taxes so paid.

4. It is contended that the referee should have been directed to find the value of the land in September, 1882, at the time defendant entered. The defendant is not prejudiced by the failure to so find for the reason as has already been stated, that he did not elect to proceed under the occupying claimants act, but permitted the trial to proceed as upon an accounting in equity.

5. Counsel for defendant in error in their brief have assailed the rule announced in *Page v. Davis*, 26 Neb., 670, and insist that one who holds only by virtue of a tax title adjudged to be void is not by any fair or reasonable construction of the occupying claimants act entitled to the benefit of its provisions. We have no occasion to discuss

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that question, since the case comes into the court upon the petition in error by Fletcher, the defendant below, and the judgment must be affirmed on other grounds. Had Brown, the plaintiff below, desired to have the judgment reviewed he should have filed his petition in error. As it is, he is presumed to be satisfied with the judgment. There being no error in the record prejudicial to the plaintiff in error the judgment of the district court is

AFFIRMED.

THE other judges concur.

ALEXANDER CARTER, JR., V. RANDALL A. BROWN.

[FILED NOVEMBER 10, 1892.]

1. **Ejectment: RIGHTS OF OCCUPYING CLAIMANT: IMPROVEMENT AND TAXES.** To entitle the defendant in ejectment on eviction at the suit of the owner of real estate to recover under the provisions of the occupying claimants act for improvements and taxes paid while in possession, it must appear that such improvements were made or such money paid while he was in good faith claiming title, legal or equitable, to the premises derived from some public office or from the United States or the state of Nebraska.
2. ———: ———: ———. L., whose only title to real estate was derived from certain tax deeds conceded to be void, executed in favor of C. a title bond conditioned that he would convey said property on payment of the consideration, at the expiration of five years. Subsequently B., the owner, recovered judgment for possession thereof in an action of ejectment against C., in which the latter sought to recover under the occupying claimants act for improvements and taxes paid by him. *Held*, in the absence of evidence that C.'s possession, actual or constructive, was by virtue of said bond, or that such money was expended for taxes and improvements, while in good faith relying upon a title acquired thereby, that a judgment for the plaintiff should not be disturbed.

ERROR to the district court for Washington county.
Tried below before HOPEWELL, J.

W. H. Eller, for plaintiff in error.

W. C. Walton, and *Charles H. Brown*, contra.

POST, J.

This was an action of ejectment by the defendant in error in the district court of Washington county to recover possession of the northeast quarter of the southwest quarter of section 21, township 19, range 11 east, in said county. The petition is in the usual form and does not call for especial notice. The answer denies the title of plaintiff and alleges title in the defendant through certain tax deeds and a title bond which will be more particularly described hereafter. At the April, 1886 term the plaintiff's cause of action was confessed so far as his title was concerned, and judgment entered in his favor in pursuance of the following stipulation:

"It is hereby stipulated by and between the parties hereto, that at the April term of court this defendant (plaintiff) may take judgment in his favor for possession in this cause, * * * and that the question of rents and profits, and improvements, and such other things and differences as are set up in defendant's answer or the defendant may have, shall be continued for settlement, or until the next term of this court."

Not being able to agree upon a settlement of the remaining issues, the case was sent to a referee with instructions to hear the evidence and report his findings of fact and conclusions of law upon the question of the plaintiff's claim of damage for rents and profits, and the defendant's claim for taxes and improvements. Subsequently, the referee submitted the following report:

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"1. That defendant took a conveyance of the land from Victor G. Lantry by a bond for a deed September 10, 1882.

"2. That defendant took possession of the land and enjoyed the rents and profits of the same for the years 1883, 1884, 1885, 1886, and 1887.

"3. That the rental value of the forty acres of land in controversy during the five years above mentioned was fifty cents per acre for each year.

"4. That defendant, subsequent to February 23, 1883, placed upon the land lasting and valuable improvements of the present value of forty dollars.

"5. That payments of taxes for the land in controversy have been made and instruments and documents concerning the land have been made, and delivered, such as are shown in the schedule hereto attached and made a part of this report, marked 'Exhibit A,' said schedule showing tax deeds, certificates of sale for taxes, quitclaim deeds, powers of attorney, one bond for a deed, and payments of taxes.

"6. That the power of attorney shown in said schedule as to date, June 10, 1881, is defective, in so far as the acknowledgment before the notary fails to show any one personally appearing before him except Alice Marsilla Eaton.

"7. That all of the tax deeds and some of the certificates of sale and tax receipts shown in said schedule are for other lands as well as the lands in controversy.

"I make the following conclusions of law:

"1. That plaintiff is entitled to the sum of \$100 as rents and profits.

"2. That defendant is not entitled to pay for the improvements put upon the land.

"3. That defendant is entitled to a lien for the taxes paid with interest, for the years 1882, 1883, 1884, 1885, and 1886, as far as pleaded in his answer, and that he is

entitled to a lien for a part of the taxes paid for each of the following years with interest: 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1870, 1871, 1872, 1873, 1875, 1876, and 1879."

Exceptions were taken to the findings by the respective parties which present the questions herein considered. The first objection to the judgment relied upon by the plaintiff in error in this court is the allowing in favor of the plaintiff below of rents and profits for a period antecedent to the date of notice of the latter's claim of title by service of summons in the ejectment suit. That question was fully considered in the case of *Fletcher v. Brown, ante*, p. 660, decided at this sitting. That case involved precisely the same facts as this, and the conclusion there reached is decisive of the question. The other questions presented by the record are all included in the one inquiry: Is the plaintiff in error on the record of the case entitled to the benefits of the occupying claimants act (ch. 63, Compiled Statutes)? His only title or pretense thereof is a title bond executed in his favor by Victor G. Lantry September 10, 1882, which is conditioned that upon the payment of the consideration therefor, of which \$300 matures five years after date, he, Lantry, would convey said premises to plaintiff in error by a good and sufficient deed. It was further provided therein that in case said Lantry was not, at the expiration of five years, able to convey by a perfect title that the damage for the breach of said contract should be the consideration paid without interest. Although plaintiff in error was a witness in his own behalf, there is in the bill of exceptions no evidence of payment by him of the consideration of the land, nor is there any proof whatever of any equity in him aside from the bond for a deed. It is not shown that he made the improvements or paid the taxes for which he claims in good faith, relying upon his title under the bond from Lantry, nor even that he went into possession, either actual or constructive, by

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virtue thereof, or even held or claimed to hold under or by virtue of said bond. Lantry's only title or claim was by virtue of certain treasurer's tax deeds admitted to be void and for taxes paid by himself and grantors. There is no evidence that his rights, whatever they may be on account of taxes so paid, have been assigned to the plaintiff in error, hence it is plain the latter cannot recover on that cause of action. (*Fletcher v. Brown, supra.*)

But there is still a more serious objection to his recovery and one which goes not only to the claim for taxes paid by Lantry and his grantors, but to the claim for improvements, and taxes paid by the plaintiff in error, viz., that he is not shown to have any such title to or interest in the premises in controversy as will entitle him to the benefits of occupying claimants act. That law was intended for the protection of those occupants of real estate only who have improved the same or expended money for taxes thereon, while relying in good faith upon such title as is mentioned in the act, and its provisions will not be extended to cases which cannot by a reasonable construction be held to be within their terms. (*King v. Harrington*, 18 Mich., 213; *R. Co. v. Hardenbrook*, 21 Kan., 440.) In the last named case it is said by Judge Valentine that "In order to get the benefits of the occupying claimants act the records must show *prima facie* at least that at the time he made the improvements on the land he had an interest therein, and that such interest was of that high character which may properly and rightfully be denominated in law or equity a title. No interest less than an apparent title would be sufficient." The provision of our statute is: "That in all cases where any person claiming title to real estate, whether in actual possession or not, for which such person can show a plain and connected title in law or equity derived from the records of some public office or from the United States or from this state, or derived from any such person by devise, descent, deed, contract, or bond, such person or persons claiming or holding

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as aforesaid shall not be evicted or turned out of possession," etc. What plaintiff in error was required to show was a plain and connected title in law or equity derived from the records of some public office or from another so claiming or holding by contract or bond. It may be conceded that Lantry had such title as would have been a sufficient protection to him as to improvement made in good faith, and that plaintiff in error would also have been within the statute had he taken and held possession under the title bond. But as his possession is not shown to have been under or by virtue of said bond, it follows that there is no such privity between him and Lantry as would entitle him to invoke the protection of the statute as against the owner of the title.

At common law we know the occupant of real estate was without remedy, upon eviction, for improvements. Whatever was annexed to the freehold the law deemed a part of it and inured to the benefit of the owner, and an occupant made improvements at his peril, although in good faith relying upon his own title. Finally, the rule was adopted by courts of equity, following the civil law, that when a *bona fide* occupant of property made improvements thereon in an honest belief of ownership, and the true owner was obliged to invoke the powers of a court of chancery, the court, by an application of the maxim, he who seeks equity must do equity, would compel him to pay for the improvements. (Sugden on Vendors, ch. 22, secs. 54, 55, 57; Story's Eq. Jur., 779*a*, 799*b*.) Courts of law subsequently modified the strict rule of the common law to the extent that in an action for *mesne* profits the *bona fide* occupant might recoup the value of his improvements. (2 Kent, Com., 335, *Jackson v. Loomis*, 4 Cow. [N. Y.], 168.) If the improvements exceed in value the owner's claim for *mesne* profits, the common law affords the occupant no remedy, while the right of the owner to recover his rents does not depend upon the statute. The radical

Koen v. State.

changes wrought by the statute are, first, that the occupant is not obliged to wait for the owner to sue for *mesne* profits, but may have his right to compensation determined before eviction, and, second, he is not limited to the value of the rents and profits, but under certain conditions is entitled to recover the full value of his improvements. When we consider the law as settled before the adoption of the statute and the wrong it was intended to remedy, we are unable to see any warrant for the exclusion of the element of good faith, which was always essential, as a condition to a recovery for improvements by a stranger to the title. There is a class of cases which hold that where the defendant's possession is under *color of title*, improvements by him will be presumed to have been made in good faith, but we have examined no such case in which the occupant is not shown to have entered and held possession by virtue of a contract or conveyance with one, at least, asserting title. There being no error apparent from the record the judgment is

AFFIRMED.

THE other judges concur.

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| 35 | 676 |
| 44 | 565 |
| 35 | 676 |
| 50 | 205 |

ED. A. KOEN V. STATE OF NEBRASKA.

[FILED NOVEMBER 16, 1892.]

1. **Libel: FELONY: MISDEMEANOR.** In a prosecution for a false and malicious libel charged to have been published in the *Kansas City Sun*, a newspaper published and of general circulation in Douglas county, Nebraska, *held*, that to charge a felony the paper must be of general circulation and that the limitation to one county merely charged a misdemeanor.
2. ———: **NEWSPAPERS: GENERAL CIRCULATION.** It is not necessary that the newspaper circulate to any considerable extent,

Koen v. State.

if at all, out of the state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published and have a general circulation.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

Ambrose & Duffie, and Lindsley & Dick, for plaintiff in error.

George H. Hastings, Attorney General, and W. S. Shoemaker, contra.

MAXWELL, CH. J.

The plaintiff in error was convicted of criminal libel in the district court of Douglas county and sentenced to imprisonment in the penitentiary for three years.

Section 47 of the Criminal Code provides: "If any person shall write, print, or publish any false and malicious libel of, or concerning another, or shall cause or procure any such libel to be written or published, every person so offending shall, upon conviction thereof, be fined in any sum not exceeding \$500, or be imprisoned in the county jail not exceeding six months, or both, at the discretion of the court, and, moreover, be liable to the party injured; *Provided*, That if said libel is published in a newspaper having a general circulation, the person so offending shall be punished by imprisonment in the penitentiary not less than one nor more than three years." The charge in the indictment is "that Ed. A. Koen, unlawfully, maliciously, and feloniously, did compose, write, and publish, and cause to be composed, written, and published, in a certain newspaper called *The Kansas City Sun*, published and of general circulation in the county of Douglas, in the state of Nebraska, a certain false, scandalous, malicious, and defamatory libel of and concerning the said Nettie Wilson." It will be observed that the charge is that the libel was published in *The Kan-*

the *City Sun*, published and of general circulation in the county of Douglas, in the state of Nebraska. It will be seen that the statute provides for two classes of cases: First, for printing, publishing, etc., a libel. This no doubt applies to ordinary cases. Where there is a conviction under such circumstances the person found guilty may be imprisoned in the county jail or fined, or the court may impose both fine and imprisonment. The statute is based upon the theory that one who prints and publishes a false and malicious libel against another—one calculated to injure his good name and reputation and injure or destroy his influence—should be branded as a violator of the law at least, if not as a criminal.

Every person is entitled to protection in the peaceful enjoyment of his property, good name and fame. The wise man said, "A good name is rather to be chosen than great riches, and loving favor rather than silver and gold" (Prov. 22:1); and his words are as applicable to-day as when uttered. A person who willfully and maliciously violates the law by a publication of the kind named has no just cause of complaint if the law is vindicated by punishing him for the offense. The law, however, increases the penalty in proportion to the injury. If the libel is published in a newspaper of general circulation, then the punishment is by imprisonment in the penitentiary. The fourth and fifth definitions given by Webster of the word "general" as an adjective are as follows: "Common to many, or the greatest number; widely spread; prevalent; extensive, though not universal; as, a *general* opinion; a *general* custom. * * * 5. Having a relation to all; common to the whole; as, Adam, our *general* sire. Milton." And the synonyms as follows: "*Common* denotes primarily that in which many share; and hence, that which is often met with. *General* is stronger, denoting that which pertains to a majority of the individuals which compose a genus, or whole. *Universal*, that which pertains to all without

exception. To be able to read and write is so *common* an attainment in this country that we may pronounce it *general*, though by no means *universal*." The word is in common use in designating general and local laws. Thus, in *Kelley v. State*, 6 O. St., 269, the constitution required all laws of a general nature to be uniform in their operation throughout the state. An act was passed giving to the court of common pleas jurisdiction of certain criminal cases in some of the counties but not in all, and the act was held to be in conflict with the constitution. There was no dispute as to the meaning of the word "general," but two of the judges were of the opinion that the case was within certain exceptions named.

In *State v. Anderson*, 44 O. St., 247, an act had been passed which applied to the city of Akron alone, and it was held to be a special act, although it purported to be general in its nature, and the same doctrine was declared in *State v. Winch*, 45 O. St., 663, and *State v. Ellet*, 47 Id., 90. In *State v. Hawkins*, 44 O. St., 98, and *State v. Hudson*, Id., 137, the distinction between a general and special statute is very clearly defined. These rules have been recognized by this court. Thus, in *School District v. Clegg*, 8 Neb., 178, it was held that an act authorizing a certain school district to issue bonds was special legislation. So an act declaring a certain ordinance of the city of Lincoln valid was held to be special legislation. (*Hallo v. Helmer*, 12 Neb., 87.) And an act to authorize Falls City precinct to issue bonds was held to be special, and therefore invalid. (*Dundy v. Richardson Co.*, 8 Neb., 508.)

In *McClay v. City of Lincoln*, 32 Neb., 412, it was held that a law framed in general terms, restricted to no locality and operating equally upon all of a group of objects, is not a special law.

In *State v. Berka*, 20 Neb., 379, it is said: "If a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are

brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation. (*McAunich v. R. Co.*, 20 Ia., 338; *Haskel v. City of Burlington*, 30 Id., 232; *R. Co. v. Soper*, 39 Id., 112; *State v. Graham*, 16 Neb., 76; *Cooley, Const. Lim.*, sec. 390.)”

Judge Sutherland in his work on Statutory Construction, sec. 116, says: “Laws of a general nature are those which relate to subjects of that nature, and deal generally with them. The requirement involves the question, What is such a subject, and how comprehensively it must be treated in legislative acts? Laws to which the requirement is applicable must be so framed as to have a uniform operation throughout the state.”

Judge Dillon in his valuable work on Municipal Corporations, sec. 20, in speaking of general laws creating municipal corporations, says: “Within a period comparatively recent the legislatures of a number of the states, following the example of the English municipal corporations act of 5 and 6 Will. IV, cap. LXXVI, heretofore mentioned, have passed *general acts* respecting municipal corporations. These acts abolish all special charters, or all with enumerated exceptions, and enact general provisions for the incorporation, regulation, and government of municipal corporations. The usual scheme is to grade corporations into classes according to their size, as into cities of the first class, cities in the second class, and towns or villages, and to bestow upon each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform. General incorporation acts, rather than special charters, would seem clearly to be the best method of creating and organizing municipal corporations. First—It tends to prevent favoritism and abuse in procuring extraordinary grants of special powers. Second—It secures uniformity of rule and construction. Third—All being created and

endowed alike, real wants are the sooner felt and provided for, and real grievances the sooner redressed."

Many other cases to the same effect might be cited. Section 251 of the Criminal Code provides that "no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit."

Now will any one contend that a statute applicable to Douglas county alone is a general law? The authorities, without an exception so far as I have observed after a pretty careful research, hold that such an act is not general but special.

Let us apply these rules to the case at bar.

The statute provides that a person who publishes a false and malicious libel against another in a newspaper of general circulation shall be punished by imprisonment in the penitentiary for not less than one nor more than three years. Here the highest term of imprisonment is six times as great as in an ordinary case, together with the brand of infamy and the loss of civil rights from conviction. Is this severe punishment to be inflicted unless the offense was committed in the manner indicated; that is, in a newspaper of general circulation? If the circulation of a paper in one county is a general circulation, then why is not the same true if it circulates in a village, township, or other subdivision of a county? If the circulation in any of these subdivisions, or the county itself, constitutes a general circulation, then the court will find it impossible to distinguish between the cases where the punishment is imprisonment in the county jail and those of imprisonment in the penitentiary. It is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county of the state, but it must extend beyond the county where it is published and have a general circulation.

It may be said that the party who first publishes the

Koen v. State.

libel, and thus puts it in the power of others, whether intentionally or not, to further injure the plaintiff by a further publication, should be punished to the full extent of the law. The answer to this is that persons must beware what they publish at second-hand, and because one party has made a false and malicious statement in regard to another the second publisher must ascertain its truth before he gives it his indorsement by publishing the same. But to constitute a penitentiary offense the publication must be in a newspaper in general circulation. By that we understand a paper not restricted to one county, nor necessarily to the state itself. In charging the offense, therefore, it should be done in the language of the statute, without limitation to a particular county. The pleader, after stating the general circulation of the paper, may then allege that it was published in a certain county, so as to give the courts of that county jurisdiction.

The indictment fails to state a felony, therefore, and the judgment must be reversed. The charge alleged being merely a misdemeanor, the plaintiff in error should not have been sentenced to the penitentiary; but it is evident that he was rightfully convicted of a misdemeanor, and the cause is remanded to the district court of Douglas county to impose a proper sentence for that offense.

JUDGMENT ACCORDINGLY.

THE other judges concur.

**CRANE BROS. MANUFACTURING CO., APPELLANT, V.
SAMANTHA KECK ET AL., APPELLEES.**

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| 35 | 683 |
| 39 | 192 |
| 35 | 683 |
| 50 | 327 |
| 53 | 189 |

[FILED NOVEMBER 16, 1892.]

1. **Bill of Exceptions: SERVICE ON ONE OF APPELLEES.** Where there are two or more principal defendants against whom the plaintiff is seeking to enforce a claim, there being no particular controversy between them, service of the bill of exceptions upon one of such defendants or his attorney within the time fixed by statute will be sufficient.
2. ———: **MOTION TO QUASH: TIME OF FILING: WAIVER.** Where a defendant fails to file a motion to quash until after briefs upon the merits have been made and served the court will consider the objection waived.
3. **Application of Payments: RIGHTS OF THIRD PARTIES.** While as between the debtor owing several debts and his creditor where the former, at the time of payment of a sum of money, fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception to this rule, as, where the money was received by the debtor from a third party whose property would be liable for the debt in case the money was not applied upon the third party's liability.
4. **Construction of Instruments: ORDER.** The instrument set out in the opinion is an order which, as the drawee refused to accept the same, the plaintiff was not bound to furnish the material mentioned therein.

APPEAL from the district court for Buffalo county.
Heard below before HAMER, J.

Brown & Brown, and Jeffrey & Rich, for appellant.

Calkins & Pratt, for appellee Samantha Keck.

R. A. Moore, for appellee Joseph Walther.

MAXWELL, CH. J.

This is an action by material-men to foreclose a mechanic's lien upon a hotel in the city of Kearney.

On the trial of the cause the court below found that the whole value of the material furnished by the plaintiff was the sum of \$643, and that the defendants had paid thereon the sum of \$450, and that the defendant Keck had sustained damages by reason of the delay of the defendants in furnishing the material, in the sum of \$193. The court thereupon found for the defendants and dismissed the action. The plaintiff appeals.

A motion is now made on behalf of Walther to quash the bill of exceptions as to him because it was not presented to him within eighty days from the rising of the court. The cause was tried on the 3d day of May, 1890, and judgment entered at that time. A bill of exceptions was thereupon duly prepared and submitted to the attorneys for Samantha Keck. Notice was given the attorney of Walther that the bill was in their hands for examination and amendment. The bill seems to have been retained by such attorneys much beyond the ten days allowed by law. When it was returned, however, it was presented to the attorney for Walther, who refused to examine the same and make any corrections thereon. The bill was thereupon presented to the judge, who signed the same. In this case, while the rights of the defendants are so far separate and distinct that a joint judgment is not sought against them, as against Walther a judgment is asked for the amount of the debt, and it is sought to enforce the same against the property of his co-defendant Keck, yet there is no diversity of interest between them as against the plaintiff and they are so far joint that service of the bill upon the attorneys of either will justify the judge in signing the same. Where there are many defendants, who appear by separate attorneys, it is impossible to serve the same bill upon all within forty, or even eighty days, and in fact is not contemplated by statute. A service upon the principal defendants is all that is required. Ordinarily, this will bring up the case as to all. The service therefore was sufficient.

The bill and transcript were filed in this court on the 3d day of November, 1890, and the motion to quash was not filed until after the briefs upon the merits had been filed. This is too late. The motion must therefore be overruled.

It appears from the record that Walther had purchased a considerable quantity of plumbing material from the plaintiff; that he paid the plaintiff \$100, and \$150 money paid to him upon this account by his co-defendant Keck. This money was paid without directions as to its application, and the plaintiff sought to apply it to another debt and now claims the right to do so. As between the debtor and creditor, there is no doubt of the rule that where the debtor fails to designate the debt, where there are several debts upon which the payment may be applied, the creditor may apply it. Where, however, the rights of third parties intervene, the rule does not apply. Thus, where A was a creditor of a firm and also of a surviving partner thereof individually, and the latter made a payment out of funds belonging to the firm without designating the debt on which it should be applied, it was held that as the funds belonged to the firm they must be applied to the partnership debt. (*Weisenfeld v. Byrd*, 17 S. Car., 106; *Thompson v. Brown*, 1 Moody & M. [Eng.], 40; 18 Am. & Eng. Ency. of Law, 240.)

This rule was applied in *Coms. v. Springfield*, 36 O. St., 643, where the county treasurer was *ex officio* treasurer of the city and its board of education, and also treasurer of the township of S. and its board of education. He received and mingled the moneys of these various corporations together. On a settlement with the county board he was unable to pay the amounts due the several corporations above named, but there was sufficient to satisfy the amount owing to the county, which the county board directed to be placed to the credit of the county and appropriated to county purposes. The money was appropriated as directed,

but it was held that the county was liable in equity to account to the other corporations for their proportionate share of the fund so appropriated. It is said: "The question then is whether the county of Clark is liable to the city of Springfield and its board of education, and the township of Springfield and its board of education, for *pro rata* shares of the moneys in the treasury, \$61,860.26, appropriated, under direction of the commissioners, to the use of the county. That the moneys of these various corporations were mingled, and that the embezzlement was from the mass, cannot be denied; and it must be further admitted that the amount appropriated to the use of the county, under direction of the commissioners, was the exact sum due to the county from Wick, but neither mingling the money, the embezzlement, nor the appropriation by the county had the effect of destroying the interest of the city, township, and school boards in the sum which was in the treasury at the time of the settlement. Equity will make it available to them by fastening a liability on the county. This would clearly be the rule as applied to individuals under such circumstances, and there is no reason for saying the same rule does not apply to public corporations. (*Van Alen v. American National Bank*, 52 N. Y., 1; *Matter of Van Duzer's Estate*, 51 How. Pr., 410; *Farmers, etc., Bank v. King*, 57 Pa. St., 202; *Pennell v. Deffell*, 4 De G., M. & G. [Eng.], 372; *Cook v. Tullis*, 18 Wall., 332; *Bayne v. United States*, 93 U. S., 642; *United States v. State Bank*, 96 Id., 30.)"

The following is the alleged contract:

"KEARNEY, NEB., October 1, 1887.

"Received from Jos. Walther the sum of \$650 in cash on account, and the amount of \$348.49 in goods returned on account, which are held by him on storage subject to our orders, and also received from him an order on Samantha Keck for \$500, which amount, when paid by said Samantha Keck to us, we agree to credit to his account, on

Crane Bros. Mfg. Co. v. Keck.

account of goods shipped by us to be used in the Keck building, and the goods ordered, which we are to ship for completing the plumbing work on said Keck building.

“CRANE BROS. MANFG. CO.,
“By MONTGOMERY & JEFFREY,
“*Their Attorneys.*”

This instrument, while not expressed in a very artistic manner, is clearly shown to be an order, which the drawee refused to accept.

J. L. Keck, who seems to have transacted all the business for Samantha Keck, testifies:

A. He [the agent of plaintiff] said that they had sent some goods, more goods than they had received value for, and that he had come to see Joe and me about it. I told him to see Mr. Frank about it, but that under no circumstances would Joe get any more money; that I was going to Cincinnati and nobody could get any money until I got back. Whatever was due them, I would see that they got their proportion of it. Then I had a conversation with another representative of Crane Bros. Manufacturing Company; that was along about the 5th day of October on my return from Cincinnati.

Q. You may state whether anything was said about how much money they had received at that time; did they state that they had received any?

A. No, sir; I am not clear now that they stated the amount they had received, but he stated that they had delivered more goods than what they were entitled to pay, and that they would not or did not want to deliver any more goods until they were paid some money or had it secured. I was just on the eve of going to the train and I told him to see Mr. Frank, that under no circumstances would anybody be paid more money, because Frank, within the next three or four days, was to start for Europe, and I was to come right back from Cincinnati.

Q. When did you return from Cincinnati?

Crane Bros. Mfg. Co. v. Keck.

A. About the 5th of October.

Q. Did you then see or meet a representative of the plaintiff?

A. Yes, sir.

Q. What was the conversation?

A. The representative of the Crane Bros. Manufacturing Company was Mr. Samuel Nevius. He wanted to know if I owed Joe Walther any balance. I told him I did. He wanted to know how much. I said I could not tell; that I hadn't the account with me and I did not exactly know for I did not know how much work was done. There was some material in the house but there was a good deal of it that was not put up. He said that he had an order from Mr. Walther on me for \$500. He showed it to me and wanted to know if I would have any objection to accepting it. I said, "yes, I had."

Q. Previous to this conversation had you been informed by Mr. Walther that he had made arrangements for them to ship the goods?

A. Yes, sir.

Q. Go on and state what was said.

A. I said to Mr. Nevius that I declined to accept an order of \$500 for material that was yet to be delivered. I would say, that if that material was delivered and that it was put up in the house in accordance with the contract, I would pay that amount of money, because there would be that amount and more due Mr. Walther, but I respectfully decline to accept an order for material not yet furnished. He said that Crane Bros. Manufacturing Company and Walther had had a settlement and there would be no question about everything being all right. I said: There has been a question. Material has been coming for this contract and was to be here long before this; that I had been to Joe to get him to write or telegraph to Crane Bros. Manufacturing Company for these things. * * *

Witness: I said I would just positively decline to pay

 Lee v. Walker.

for anything in advance; that upon the receipt of the goods and put up in the house according to the contract, I would guarantee that they would get their money, but I would not pay anybody a dollar until the work had been completed. He said that that would be perfectly satisfactory to them. Within a week or ten days from that time he came back and said that Crane Bros. Manufacturing Company had returned the order and required an unqualified acceptance. I said unqualifiedly that I would not do it and I did not.

The testimony clearly shows that Walther was indebted to the plaintiff in a considerable amount; that this account had been running for a considerable time, and that the plaintiff refused to furnish the goods in question unless it had security. Therefore, when Mr. Keck refused to accept the order the proposition fell through. It is very clear that the court erred in its findings and judgment. The judgment is therefore reversed and the cause will be remanded to the district court to render judgment in accordance with this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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| 25 | 689 |
| 35 | 689 |
| 35 | 689 |
| 55 | 443 |

LEE, FRIED & Co. v. JOHN WALKER ET AL.

[FILED NOVEMBER 16, 1892.]

Appeal from Justice's Court: ISSUES IN APPELLATE COURT.

A cause appealed from a justice of the peace to the district court must be tried upon substantially the same issues in the appellate court as were presented to the justice of the peace, unless some matter such as payment, release, etc., has arisen since the former trial.

ERROR to the district court for Custer county. Tried below before HAMER, J.

Henry M. Kidder, for plaintiffs in error.

J. C. Porter, and *M. McSherry*, *contra*.

MAXWELL, CH. J.

This action was brought before a justice of the peace by the plaintiffs against John Walker and Robert Walker upon a promissory note. The defendants in their answer admitted the execution of the note, but claimed a set-off of \$125 for services rendered by Robert Walker for the plaintiffs. On the trial of the cause, the justice found for the defendants and dismissed the action. The plaintiffs then appealed to the district court, where they filed a petition to which the defendant, John Walker, filed an amended answer as follows:

"Comes now John Walker and answering for himself alone, and in answer to the petition of the plaintiffs, admits the making, execution and delivery of the promissory note described in said petition.

"Defendant further answering said petition alleges that he has no knowledge whereof to form an opinion, and therefore denies each and every other allegation, and requires that strict proof may be had as to the truth of said allegations.

"Defendant further answering and by way of defense alleges the fact to be that this defendant signed said note at the request and instance of the payee thereof, to-wit, John C. Fitzen, and that said note was given without any consideration of any kind or character and that this defendant never received or derived any consideration or benefit whatever from the signing of said note. Wherefore defendant prays judgment that he may go hence without day and find his costs."

Lee v. Walker.

The plaintiffs thereupon moved to strike out of the answer the first six and the last seven lines "for the reason" that that portion of said answer raises a new issue in this cause and such issue was not raised in the court below. This motion was overruled.

Robert Walker filed a separate answer and claimed a set-off as follows:

"Defendant further answering plaintiffs' petition and by way of cross action alleges the fact to be that the plaintiffs herein are indebted to this defendant in the sum of \$400 as follows: To services as sole owner and manager from November 11, 1887, to March 11, 1888, four months, at \$100 per month, and that said services were performed for the plaintiffs at plaintiffs' request and at the agreed price of \$100 per month, and that said services were reasonably worth the said sum of \$400. Wherefore defendant prays judgment against the plaintiffs in the sum of \$400 with interest at the rate of seven per cent from March 11, 1888, and for the costs of this action."

On the trial of the cause the jury returned a verdict as follows:

"We, the jury in this case, being duly impaneled and sworn, and after due deliberation, do find and say that there is due to the defendant, Robert Walker, the sum of \$355.80, and we do further find that there is no cause of action as against the defendant, John Walker.

"JAMES DINWIDDIE,
"Foreman."

There is also a plea of payment.

It is very clear that the judgment cannot be sustained.

This court, by an unbroken line of decisions, has held that "cases are to be tried upon substantially the same issues in the appellate court as in the court of original jurisdiction." (*O'Leary v. Iskey*, 12 Neb., 136; *Courtney v. Price*, Id., 192; *U. P. Ry. v. Ogilvy*, 18 Id., 638; *Fuller v. Schroeder*, 20 Id., 631.) Otherwise the appeal, instead

Lee v. Walker.

of being a retrial of the cause presented to the court of original jurisdiction where the prevailing party would be entitled to costs, might by presenting new issues in the appellate court make an entirely different case from that tried in the court below and thus in effect be an original action. Thus the prevailing party who had rightfully recovered a judgment in the inferior court and his costs, might be placed in the wrong and lose both his judgment and costs without a new trial. Where an appeal is taken to an appellate court, the same case substantially is to be tried as in the court below. Any other rule makes the trial in the inferior court a farce, and the judgment, although it may conform to the pleadings and proof, a thing of no importance—a needless performance to evade the law and recover costs, if the judgment in a party's favor is less than \$200. This cannot be permitted. There was an entire disregard of these decisions in this case.

The question whether the set-off is proper is not raised and therefore is not before us.

On the trial in both courts there appears to have been a superabundance of motions—a practice which should not be encouraged.

The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HENRY T. CLARKE V. ROBERT WALKER ET AL.

[FILED NOVEMBER 16, 1892.]

ERROR to the district court for Custer county. Tried below before HAMER, J.

Henry M. Kidder, for plaintiff in error.

J. C. Porter, and *M. McSherry*, contra.

MAXWELL, CH. J.

The questions involved in this case are substantially the same as in the case of *Lee, Fried & Co. v. Walker*, ante, p. 689, just decided, and the same decision will be rendered in this case as in that. The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN L. MEANS ET AL. V. DANIEL KENDALL, ADMINISTRATOR.

[FILED NOVEMBER 16, 1892.]

Negotiable Instruments: ACTION ON LOST NOTE: INDEMNITY BOND. Where a negotiable note is lost before it becomes due the court will require the plaintiff to give an indemnifying bond to the maker as a condition of recovering judgment, but where the instrument is lost after it becomes due no bond ordinarily will be required.

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| 35b | 693 |
| 40 | 490 |
| 35b | 693 |
| 53 | 396 |

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiffs in error.

Thummel & Platt, contra.

MAXWELL, CH. J.

On the 27th of October, 1887, John L. Means borrowed from John Kendall the sum of \$2,000, at nine per cent interest, and gave his note therefor signed by S. N. Wolbach as surety. On the 15th of October, 1888, Means sent a check to Kendall for \$180 with a request for an extension of time of payment. To this Kendall replied as follows :

“Received check for \$180 to apply on interest on your note for \$2,000, dated October 17, 1888. Have credited said note with the same. The note is all right, let it run.

“Yours truly, JOHN KENDALL.”

Within a few months after the above transaction Kendall died, and the defendant in error was appointed administrator of his estate, and brought an action on the note in question and recovered judgment thereon for the principal and interest. The note, it appears, is lost, and the plaintiffs in error insist that they should be protected by a bond of indemnity. Where a negotiable note is lost before maturity, a court ordinarily will require a bond of indemnity to be given, because the note may have passed into the hands of an innocent holder, and thus the maker be subjected to loss ; but if the instrument when lost was already past due, no person could become an innocent purchaser so as to be protected as against the real owner. Therefore in the latter case no bond is necessary. (*Mowery v. Mast*, 14 Neb., 510; *Thayer v. King*, 15 O., 242; Story's Eq. Juris., sec. 86a.) The proof fails to show a transfer of

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the note, or any fact to excite suspicion that the note in question is not the property of the estate. The judgment is right and is

AFFIRMED.

THE other judges concur.

53 NW 603

H. A. DARNER V. DANIEL DAGGETT.

[FILED NOVEMBER 16, 1892.]

1. Appeal from County Court: ISSUES IN APPELLATE COURT.

It is the settled law of this state that, when an appeal is taken from the county court to the district court, the cause is to be tried in the latter court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the trial.

2. Allegata et Probata. The testimony in a case should be confined to the issues formed by the pleadings.

3. Admission of Incompetent Testimony. In a cause tried to a jury, the admission of evidence which has no legitimate bearing on any matter put in issue by the pleadings, and which is prejudicial to the party complaining, is good ground for reversal of the judgment.

4. Assignments of Error. An assignment of error in a motion for a new trial, and in a petition in error, that "the court erred in admitting the evidence of witnesses for plaintiff and excluding the evidence offered by defendant, as shown by pages 5 and 6 of the record furnished by the official reporter, and made a part of the record by the bill of exceptions herein," is sufficient to entitle the party to review the rulings of the trial court on the admission and rejection of testimony, recorded on said pages of the transcript of the evidence.

5. Trial: READING REPORTER'S NOTES TO JURY. The jury, after retiring for deliberation, returned into court, announced that they were unable to agree, and requested to have a portion of the testimony of the defendant read to them by the official stenographic reporter, which was done in the presence of the attorneys for the respective parties. *Held*, Not reversible error.

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| 35 | 695 |
| 40 | 795 |
| 35 | 695 |
| 43 | 735 |
| 35 | 695 |
| 47 | 818 |
| 148 | 393 |
| 35 | 695 |
| 54 | 631 |
| 55 | 198 |
| 55 | 442 |
| 35 | 695 |
| 58 | 538 |
| 35 | 695 |
| 159 | 348 |
| 35 | 695 |
| 62 | 742 |

Darner v. Daggett.

6. Instructions: EXCEPTIONS: REVIEW. An exception must be taken to the giving of instructions in a civil case in order to review them in this court.

ERROR to the district court for Dawson county. Tried below before HAMER, J.

C. W. McNamar, and G. W. Fox, for plaintiff in error.

H. M. Sinclair, contra.

NORVAL, J.

Defendant in error brought this action in the county court, alleging in his petition filed therein, in substance, that the defendant sold him a stock of hardware, for which Daggett was to pay the Chicago market prices of said classes of goods; that defendant furnished plaintiff an invoice of said goods, and falsely and fraudulently represented to plaintiff that the same was correct and based upon said market, which invoice amounted to the sum of \$3,997.65, which amount plaintiff, relying on said representations, paid; that said invoice was not correct and was not based upon the Chicago market as agreed upon; that it was incorrectly added up, so that it was \$99 more than it should have been; that the invoice price so furnished was in excess of the Chicago market to the amount of \$450, and that there was a shortage of goods, the same being charged on said invoice and paid for by plaintiff to the amount of \$400, with prayer for judgment against the defendant for \$949, with interest thereon.

The defendant answered by a general denial.

Upon the trial the plaintiff recovered a judgment, and the defendant appealed therefrom to the district court, where the plaintiff obtained a verdict for \$635, for which sum judgment was rendered.

The first error complained of relates to the ruling of the court below in sustaining plaintiff's motion to strike

out all of the defendant's answer excepting the general denial. The petition in the county and district courts was the same. In the appellate court the defendant filed an answer alleging, in effect, that plaintiff represented he was the owner of a valuable farm in Dawson county worth \$2,700, free from incumbrance excepting a mortgage for \$1,300, which plaintiff proposed to trade for said stock of goods; that defendant, relying on said statements and representations, traded said stock for said farm, and took plaintiff's notes for the difference between the farm, as so represented, and the price of said stock as invoiced; that in truth said farm was not worth more than \$1,800; that defendant, relying on said representations of the plaintiff as to the value of said farm, did not go to see it, and did not examine the mortgage records until long after said trade; that there was an additional mortgage on said farm at the time for \$130.50, which plaintiff concealed from defendant, which mortgage defendant was obliged to and did pay, to his damage in the sum of \$130.50. The defendant, further answering, denied each and every allegation of the petition not by him specifically denied, and asked judgment for said sum of \$130.50.

It is obvious that the court did not err in striking out of the answer the allegations therein relating to the representations of the plaintiff as to the value of the farm and the incumbrances thereon, for the reason that no such issue was presented in the county court. As already stated, the answer in that court was simply a general denial. Defendant should have set up in his first answer his counter-claim for damages; not having done so, he could not present it for the first time in the district court on the trial of his appeal. It is firmly settled in this state that a cause is to be tried in the district court upon appeal upon the same issues as in the court from which the appeal was taken, with the exception of new matter arising after the first trial. (*O'Leary v. Iskey*, 12 Neb., 136; *Baier v. Humpall*, 16 Id., 127;

Darnier v. Daggett.

U. P. R. Co. v. Ogilvy, 18 Id., 636; *Fuller v. Schroeder*, 20 Id., 631; *Lamb v. Thompson*, 31 Id., 448; *Bishop v. Stevens*, Id., 786.)

Complaint is made of the ruling of the court below on the admission of testimony. The defendant in error was sworn as a witness in his own behalf and, after having testified that plaintiff in error represented the goods were of a good quality, that he had never seen them prior to the purchase, but relied upon the representations of plaintiff in error, and that the goods were not merchantable, but mostly were old-fashioned, many of the stoves were broken, some were second-hand stoves and others were wood stoves of no use, was asked this question: "What was the difference, as near as you can estimate it, in value, between the stock of goods in the condition in which you received it and what the stock of goods would have been had it been as represented?" This question was objected to by plaintiff in error as speculative and immaterial. The court overruled the objection, an exception was taken to the ruling, and the witness answered, "\$1,500." In this we think there was error. The testimony did not tend to prove any issue raised by the pleadings. The petition does not charge that the defendant below made any false representations as to the quality of the goods. The gist of the action is to recover damages for falsely representing that the invoice of the stock was based upon the Chicago market, errors in the footings of the invoice, and shortage of goods. In order to recover damages on the ground that the stock was not as represented, and that the goods were unsalable and in bad condition, plaintiff should have pleaded the facts in his petition. Even had the petition been thus framed, the testimony would have been incompetent. In such a case it would be manifestly improper for a witness to state his opinion as to the difference between the value of the goods in the condition received and what they would have been had they been as represented. That is for the jury

to determine from the entire testimony. Witnesses should, as a general rule, state the facts, leaving it to the jury to draw the proper conclusions therefrom.

It is urged by defendant in error that the above ruling in regard to the admission of testimony should not be considered by this court, for the reason that the same is not sufficiently raised by the motion for a new trial or in the petition in error. The second assignment in the motion, as well as in the petition in error, is in the following language: "The court erred in admitting the evidence of witnesses for plaintiff, and excluding the evidence offered by defendant as shown on pages 5, 6, 11, 13, 14, 43, and 43½ of the record furnished by the official reporter and made a part of the record by the bill of exceptions herein." The question and answer objected to, which are quoted above, are found on page 5 of the transcript of the testimony. The ruling complained of was, with sufficient definiteness, pointed out in the motion for a new trial. The attention of the trial court was as specifically challenged to its ruling on the admission of the testimony complained of as if the testimony of the witness had been set out in the motion, for to no other question on page 5 of the transcript was an objection made or an exception taken. For the same reason, we think the assignment in the petition in error is not too general to be considered.

Plaintiff in error also presents the point that the court below erred in permitting the official stenographer to read to the jury a portion of the testimony of the plaintiff in error. The record discloses that after the jury had retired to consider of their verdict, they came into court and asked to have a portion of the testimony of the defendant Darnier read by the reporter. Counsel for defendant objected. The objection was overruled, an exception was taken, and the testimony called for was read. We are unable to see how plaintiff in error was in the least prejudiced by the reading of the reporter's notes. It does not appear what

Darner v. Daggett.

portion of Darner's testimony was read to the jury. For aught that appears it was that part which was most favorable to his side of the case. If such were true, the reading was to his benefit. Again, as was said by this court in *Jameson v. State*, 25 Neb., 185, while the practice of allowing an official stenographer to read to the jury his notes of the testimony of a witness, upon the request of the jury, should not be encouraged, a judgment will not be reversed for that cause. Under the provisions of section 287 of the Civil Code, where a jury, after retiring for deliberation, disagree as to any part of the testimony, the court is authorized to give its recollection as to the testimony on the point of dispute. The reading by the official reporter of the testimony of a witness examined on the trial is certainly within the spirit if not within the letter of the statute. The stenographic reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to.

It is next insisted that the court erred in giving the following instruction: "1. You will determine whether there was a shortage, and if you find that there was, you will allow the plaintiff the market value of the articles which the defendant failed to furnish, and you will be careful not to make too high an estimate. To this you may add the amount of the alleged error in computation, if you find the error and amount proven." No foundation was laid for a review of this instruction, for the reason no exception was taken to the giving of the same. This was necessary in order to review the alleged error. (*Scofield v. Brown*, 7 Neb., 222.)

As there must be a new trial it is not deemed necessary to pass upon the sufficiency of the evidence to support the verdict. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

HANOVER FIRE INSURANCE COMPANY ET AL. V. MARTIN SCHELLAK ET AL.

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| 35 | 701 |
| 41 | 242 |
| 85 | 701 |
| 61 | 52 |

[FILED NOVEMBER 16, 1892.]

1. **Review on Error: MOTION FOR NEW TRIAL: OBJECTIONS TO INSTRUCTIONS** to the jury must be made in the motion for a new trial, in order to have them reviewed by the supreme court.
2. **Evidence: OBJECTIONS TO THE REJECTION** of certain testimony considered and overruled.
3. **The evidence in the case** examined and considered, and *held*, that the damages assessed by the jury are not excessive.
4. **Sufficiency of Petition.** *Held*, That the petition states a cause of action.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Bartlett, Crane & Baldrige, for plaintiffs in error.

Bowen & Bowen, contra.

NORVAL, J.

Defendants in error recovered two judgments in the court below on a policy of fire insurance; one against the plaintiff in error, the Hanover Fire Insurance Company, in the sum of \$2,533.33 $\frac{1}{2}$, and the other against the plaintiff in error, the Citizens Insurance Company, for the sum of \$1,266.66 $\frac{2}{3}$. The policy was for the sum of \$4,000; two-thirds of said amount being insured by the Hanover Fire Insurance Company and the other one third of said sum being insured by the Citizens Insurance Company. The property insured was a two-story frame roof brewery and a two-story tin roof stone and frame ice house and beer vault, used by the assured for brewing purposes. There was \$3,000 additional insurance upon the property. The buildings were totally destroyed by fire.

Hanover Fire Ins. Co. v. Schellak.

Complaint is made in the petition in error, as well as the brief of counsel, of the giving of several paragraphs of the court's instructions to the jury. We are unable to review the alleged errors in the instructions for the reason no objection to the charge of the court was made in the motion for a new trial. (*Cleveland Paper Co. v. Banks*, 15 Neb., 23; *H. & G. I. R. Co. v. Ingalls*, Id., 123; *O. & R. V. R. Co. v. Walker*, 17 Id., 432; *Weir v. B. & M. R. Co.*, 19 Id., 212; *Nyce v. Shaffer*, 20 Id., 502; *O., N. & B. H. R. Co. v. O'Donnell*, 22 Id., 475; *Planck v. Bishop*, 26 Id., 593.)

It is claimed that the court erred in not permitting the witness, Theodore Bauersach, to answer the following questions propounded to him on cross-examination by plaintiffs in error:

"State when the malt house and the house extending west of it was built.

"How far is it from the south line of the original building to the north line of the malt house?"

It is contended that the purpose of these questions was to show that the policy had been invalidated by the unauthorized increase of the risk after the insurance was written, by the erection of a structure near the insured premises. There is certainly nothing in the second question, standing alone, or when read in connection with the testimony which had been previously given, which, in any manner, tended to establish that the hazard had been increased. Had the witness answered, and the same had been the most favorable to the parties complaining, we are unable to perceive how it could have thrown any light on the question in controversy. It was quite immaterial when the malt-house was erected. There is no dispute but what it was built before the policy thereon was written. If the plaintiffs in error desired to prove that the structure extending west of the malt house was built after the contract of insurance was written, they should have so framed their

Hanover Fire Ins. Co. v. Schellak.

question. As the first part of the interrogatory related to an immaterial matter, the objection to the whole was properly sustained. There is another reason why the refusing to allow the witnesses to answer these questions is not ground for reversal. Plaintiffs in error, by pleading in their answers an arbitration between the parties of the damages sustained under the policy, in effect admit that the policy was in force at the time of the fire.

There was testimony before the jury tending to prove that there was no increase of the risk after the policy was written. This phase of the case was submitted to them by the court upon proper instructions, and their findings ought not to be molested. So, also, was the question of arbitration properly submitted to the jury, and their finding was against plaintiffs in error.

It is next insisted that the verdict is excessive. We find in the record evidence tending to prove that the premises insured at the time of the fire were of the value of \$8,000 or over. There was a total destruction of the property, except the foundation, which was worth about \$200. The total insurance was \$7,000, of which sum \$3,000 was in companies other than the plaintiffs in error. As the total amount of the policies did not exceed the entire loss, the jury would have been justified, under the proofs, in assessing damages against plaintiffs in error for the full amount of the policy. True there was evidence before the jury from which they could have found that the total loss was less than \$4,000, but they believed plaintiffs' witnesses on the question of value, and we are not able to say that they were not justified in doing so.

It is finally insisted that the petition does not state a cause of action, because it does not allege that the losses are unpaid. The petition, after setting up the execution and delivery of the policy, and the total destruction of the buildings by fire, alleges that plaintiffs, by reason of said fire and the burning of said buildings, have sustained loss

Kaiser v. State.

in the sum of \$10,000; that said fire did not occur by reason of any act or negligence or procurement of the plaintiffs or either of them, and that they have performed all the conditions of said policy to be performed by them. This was sufficient without averring that the damages had not been paid. Payment was a matter of defense to be pleaded and proved by the defendants. Plaintiffs were not required to either allege or prove that the losses had not been paid. The judgment is

AFFIRMED.

THE other judges concur.

35 704
51 348

CHARLES A. KAISER V. STATE OF NEBRASKA.

[FILED NOVEMBER 16, 1892.]

1. **Criminal Law: CONVICTION ON CIRCUMSTANTIAL EVIDENCE.**
In order to warrant a conviction on circumstantial evidence, the evidence must be of so conclusive a character as to prove beyond a reasonable doubt that the accused, and no other person, committed the offense charged.
2. **Larceny: SUFFICIENCY OF EVIDENCE.** Evidence examined, and held, not to sustain a judgment of conviction for larceny.

ERROR to the district court for Lancaster county. Tried below before HALL, J.

Frank J. Kelley, for plaintiff in error.

George H. Hastings, Attorney General, contra.

POST, J.

The plaintiff in error was convicted in the district court of Lancaster county on the charge of larceny and sentenced to imprisonment in the penitentiary for the period of

eighteen months. He subsequently filed a petition in error in this court in which he alleges as grounds for a reversal thereof: First, the evidence does not sustain the charge of the information and is not sufficient to sustain a conviction; second, misconduct on the part of the county attorney in his closing address to the jury; and, third, that the court erred in its instruction defining a reasonable doubt.

According to the view we take of the case it will be necessary to notice the first objection only. The facts, briefly stated, are these: On the afternoon of December 25, 1891, one Michael Gallagher, in company with several friends, visited Carr's saloon in the city of Lincoln. After drinking at the bar and paying a bill to the barkeeper he placed his money, about \$90, mostly in gold, in his inside vest pocket. He remained in the saloon aforesaid from about 1 o'clock until 7 o'clock P. M., when he visited another saloon and from thence went to his lodging house, where he first discovered that his money was gone. The plaintiff in error had been engaged in conducting a restaurant or lunch counter in the basement of the building, and assisting the proprietor of the saloon, for which he was accustomed to receive pay from time to time in change amounting to about \$10 per month. The night in question he is shown to have spent \$13 at a house of prostitution, and to have two twenty-dollar gold pieces the next morning, and although it is not clearly established, the inference from the facts in evidence is, that he was not possessed of any such a sum of money the day previous, while the explanation thereof given by him is not satisfactory and apparently false. On the other hand, it does not appear from the evidence that the plaintiff in error had any opportunity to steal the money while in the saloon, and it is not claimed by the state that the parties met at any other place that day. It appears that the saloon was well patronized that afternoon and that customers were constantly coming and going, while Gallagher sat there apparently unconscious and certainly

Kaiser v. State.

intoxicated. The latter does not recollect meeting plaintiff in error that afternoon, while Lawrence Carr, the bar-keeper, who was called by the state, testified on cross-examination as follows:

Q. You did not see him (plaintiff in error) and Gallagher together on Christmas day?

A. No, sir; they were not together, not that I saw; I don't recollect; I could not remember; I know they were not together. They might have spoken, but they were not together; Gallagher came in with his friends.

No attempt was made by the state to identify the money found in the possession of the accused as that lost by Gallagher, further than as stated above. The case, therefore, is this: Gallagher, while intoxicated, lost a sum of money. Soon thereafter the plaintiff in error is proven to have been in possession of a sum of money corresponding in kind to that lost by Gallagher, and under circumstances tending to show that he did not come by it honestly. Circumstantial evidence to warrant a conviction should be of such a convincing character as to prove beyond a reasonable doubt that the accused, and no other person, committed the crime with which he is charged. (*Walbridge v. State*, 13 Neb., 236; *Bradshaw v. State*, 17 Id., 147.) Here, aside from the possession by the plaintiff in error of an unusual sum of money, there is no proof whatever to connect him with the larceny, if we assume that the money was in fact stolen from Gallagher, an assumption not fully warranted by the evidence. Not only is there a failure to show an opportunity for the commission of the crime charged, but it affirmatively appears from the testimony of the witnesses for the state that the plaintiff in error was not at any time in company with Gallagher while the latter was in the saloon. While the evidence was admissible as tending to establish the guilt of the accused, and while it may be said to raise a strong presumption that he did not come by the money honestly, it is certainly insufficient to exclude the

State, ex rel. McClosky, v. Doane.

theory of his innocence of the crime of larceny and to establish his guilt thereof beyond a reasonable doubt. The judgment of the district court is reversed and the case remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

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| 53 | 248 |
| 54 | 232 |

STATE OF NEBRASKA, EX REL. HENRY McCLOSKEY ET AL., V. GEORGE W. DOANE, JUDGE.

[FILED NOVEMBER 16, 1892.]

Foreclosure Sale: FAILURE TO FILE EXCEPTIONS TO CONFIRMATION: REVIEW: MANDAMUS TO DISTRICT JUDGE TO FIX AMOUNT OF APPEAL BOND. Where, on the return of an order of sale in a foreclosure proceeding, the defendant has notice of an order to show cause against the confirmation of a sale of the mortgaged property, but allows the sale to be confirmed without exception, he is without a remedy in this court, and a writ of *mandamus* will not be allowed to compel the district judge to fix the amount of an undertaking in appeal in order to enable the defendant to have the order of confirmation reviewed in this court.

ORIGINAL application for *mandamus*.

Chas. F. Tuttle, and *Pound & Burr*, for relators.

Lake, Hamilton & Maxwell, and *W. W. Morsman*, contra.

Post, J.

This is an original application for a writ of *mandamus* to compel the respondent, one of the judges of the fourth judicial district, to fix the amount of an appeal bond. The material facts are as follows: W. W. Morsman obtained a decree of foreclosure in the district court of Douglas county

State, ex rel. McClosky, v. Doane.

against certain real estate in the city of Omaha. Thereafter the relator, Henry McClosky, owner of the equity of redemption, filed a written request for a stay, and the execution of said decree was accordingly stayed for the period of nine months. At the expiration of the stay an order of sale was issued, by virtue of which the mortgaged property was in due form advertised for sale and sold to the plaintiff Morsman. On the 24th day of September, 1892, return of said order of sale having been made, the district court made and entered of record an order to show cause by the 1st day of October following, why said sale should not be confirmed. Mr. Tuttle, attorney for the defendants therein, notified the plaintiff that he was about to object to confirmation of the sale on behalf of said defendants. Plaintiff in reply informed him that if he would make any such showing as would place the defendant Henry McClosky on record so that he would be bound by the order of court with respect to a deficiency judgment he (plaintiff) would consent to have said sale set aside and a new sale ordered. Defendants, although notified of the order to show cause against a confirmation of the sale, made no motion to set aside the sale or other objections thereto. After the court had examined the return and entered the order of confirmation, defendants, by their said attorney, requested the court to fix the amount of an appeal bond, saying that they desired to appeal from said order to this court. In reply to a question by the court if any cause had been shown against the confirmation and for a deficiency judgment said attorney answered that there was no objection to the confirmation, but that defendants wished to appeal. It was further stated by said attorney in open court that the reason no motion was made to set aside the sale was that the defendants feared that plaintiff Morsman would confess such a motion and that the property would not bring as much on a second sale by \$4,000 or \$5,000, thereby increasing by that amount the deficiency judgment.

State, ex rel. McClosky, v. Doane.

The request to fix the amount of an appeal undertaking was denied by the court, whereupon this proceeding was instituted by the defendant McClosky. It is claimed by him that the order of confirmation is a final order from which an appeal will lie to this court. (See *Bank v. Green*, 8 Neb., 297; *Berkley v. Lamb*, Id., 392.)

We are also referred to the third subdivision of section 677 of the Code of Civil Procedure, which provides that "when the judgment, decree, or order directs the sale, delivery, or possession of real estate, the bond shall be in such sum as the court or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and will not, during the pendency of such appeal, commit, or suffer to be committed, any waste upon such real estate." Under the above provision it is claimed by the relator that he is entitled, as a matter of right, not only to an appeal from the order of confirmation, but also to have execution of the deed to the purchaser and the delivery of possession thereunder stayed during the pendency of his appeal, and to that end it is the duty of the district court to fix the amount of his appeal undertaking. It is true that under our practice an appeal will lie from a final order in an equitable proceeding, as, for instance, an order of confirmation. But what is the force and effect of an appeal from such an order under our practice and how is it to be tried in this court? An examination of this question is attended with much confusion, owing to the fact that in some states all appellate proceedings are denominated appeals, while in others the distinction between appeals in equity and review upon petition in error is strictly adhered to. Ours appears to be a modified form of the old practice, and although the distinction between appeals and proceedings in error is maintained, the difference in cases like this exists in name rather than in fact. An appeal, strictly speaking, is the removal of a cause from a lower to the appellate court for trial *de novo*. Mr. Powell,

State, ex rel. McClosky, v. Doana.

in his work on Appellate Proceeding, sec. 4, ch. 6, says: "Although the various modes of proceedings are prosecuted in different ways and called by different appellations, as appeal, review, error, and the like, and these names often confounded and misapplied, yet the object to be obtained is one or the other of two results: either by an appeal to obtain a rehearing and new trial of the case upon its facts and merits, or a review of alleged errors in law in the record of the judgment and proceedings which will result either in the reversal or affirming of the judgment; which are properly called proceedings in error. By the first, the appeal, when perfected in accordance with the statute and the rules of the court, the whole case, with its record and proceedings, is taken from the court below into the appellate court, there to be again tried upon the issues between the parties, as though the case originated in such appellate court; which appeal has the effect to set aside and vacate the original verdict and judgment in the case, and the result remains wholly dependent on the future judgment which may be rendered in the case upon the appeal and new trial. By the second proceeding, review and error, the result depends entirely upon the question whether the appellate court finds the alleged error in the record of the judgment and proceedings of the court below." The practice in this state is evidently modeled after the practice in the English chancery courts, wherein the purchaser at judicial sale was required to procure at his own expense a copy of the report from the master showing that he was the best bidder. After the report had been filed, the purchaser was required to apply to the court by motion for an order of confirmation. Upon such motion an order *nisi* was entered, i. e., that a confirmation absolute would be entered unless cause was shown against it within eight days. If no cause was shown within the time specified the sale was confirmed as a matter of course. (2 Daniel's Ch., 1274, 1275; 1 Sugden on Vendors, 82.)

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If the defendants in the foreclosure suit are entitled to an appeal from the order of confirmation, it is apparent that such appeal must be heard in this court upon the record as made up in the district court. It is not therefore an appeal within the ordinary meaning of the term, but rather a proceeding for the purpose of having the order of confirmation reviewed as upon petition in error, but which comes into this court in the manner provided for appeals. And inasmuch as no exception or objection was made to the report of the sale, but, on the contrary, the relator professed to be fully satisfied with the proceedings of the district court, it is apparent that he has now no reason to complain because the court took him at his word and refused to fix the amount of an appeal bond. A defendant who is personally served and is shown to have notice of the order to show cause against confirmation of the sale, but allows it to be confirmed without objection, does not occupy a particularly favorable attitude in this court, whether he comes here by appeal or petition in error. He has had his day in court, and has himself only to blame for being practically without a remedy. The writ is denied and the action dismissed.

WRIT OF MANDAMUS DENIED.

THE other judges concur.

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| 85 | 711 |
| 50 | 288 |

MARY E. GANDY V. JOLLY, SWAN, DEW & HARDIN.

[FILED NOVEMBER 23, 1892.]

1. PROCESS: IRREGULARITY OF SERVICE: WAIVER OF DEFECT.

Where there is actual personal service of process upon a defendant, as by reading the summons to him in place of serving a copy of the same, and the defendant does not appear and object

Gandy v. Jolly.

on that ground, and judgment is rendered against him, it is not open to collateral attack, as the judgment is not void but voidable.

2. ———: ———: ———. If there is any irregularity in the manner of service on the defendant of valid process, he must take advantage of such irregularity by motion or other proceeding in the court where the action is pending.
3. ———: SERVICE IN ANOTHER COUNTY. Where an action is instituted by attachment against an absconding debtor in the county from which he absconded, process may be served upon him in any other county of the state, and a judgment rendered on such service will be valid unless he appears and contests the right to maintain the action there.

MOTION for rehearing of case reported in 34 Neb., 536.

Daniel F. Osgood, and E. W. Thomas, for the motion.

MAXWELL, CH. J.

An opinion was filed in this case which is reported in 34 Neb., 536. A motion for a rehearing has been filed in this case and as the questions involved are of considerable importance we have deemed it proper to present the reasons for our ruling in the form of an opinion.

Briefly stated, the defendants in error are partners, and in April, 1888, brought an action by attachment in the county court of Richardson county against one Charles U. Richardson, and the plaintiff in error was served with notice as garnishee. She answered that she had about 2,000 bushels of wheat of Richardson's subject to her chattel mortgage lien thereon for a loan of money. Afterwards judgment was taken by default against Richardson in favor of the defendants in error for the sum of \$145, and costs taxed at \$33.50, and the plaintiff in error was ordered to pay into court the surplus of wheat held upon her chattel mortgage. This not being done the defendants in error brought an action against the plaintiff in error for the value of said property. In her answer she denied that the

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defendants in error had recovered judgment against Richardson. On the trial the defendant in error recovered judgment in the district court against the plaintiff in error, and she now brings the cause into this court; the defense being that there is no valid judgment against Richardson.

The grounds upon which the plaintiff in error bases her claim are that the action was brought in the wrong county and that service is shown to have been made upon Richardson by reading the summons to him. Do these defects render the judgment void?

In *Newlove v. Woodward*, 9 Neb., 502, in a direct attack upon the judgment based on such service, this court held it insufficient. That case has been followed in one or two other cases and no doubt is correct, where objection is made in a proceeding to correct the judgment. But suppose a judgment has been rendered, as in this case, upon such service, is the judgment void? We must bear in mind that the *nisi prius* court has held it sufficient and the question is did that court err?

In Black on Judgments, sec. 224, it is said: "Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction. In any other case there may be error in the subsequent proceedings, but they will be sustained against a collateral attack. But a judgment recovered by default, upon service of the summons by delivery of a copy to a third person who is not a resident at the 'house of defendant's usual abode,' is void for want of jurisdiction. And so a citation addressed to and served upon a stranger, although he is the authorized agent of the defendant, is not binding upon the latter, and

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will not authorize a judgment against him. So a judgment by default is void when the service had upon the defendant consisted only of the handing to him, by plaintiff's attorney, of a copy of the declaration on the day before the original declaration was filed. And the same consequences were held to result in a case where the return to the summons was made in the name of a deputy sheriff, instead of in the name of the sheriff himself. And it is said that where the sheriff, who serves the writ, is himself the plaintiff, the judgment in the suit so begun is a nullity, and the defendant may restrain it by injunction."

In Freeman on Judgments, sec. 126, the matter is stated very clearly. It is said: "From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not, ordinarily, make the judgment vulnerable to a collateral attack. In case of an attempted service of process, the presumption exists that the court considered and determined the question, whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous, cannot be void."

As applied to this case, if we take the statement of the plaintiff in error, there was an attempt to serve a valid summons on Richardson. He was notified that an action had been instituted against him and that it was his duty to

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answer at a definite time. It is true the service as shown by the return was not by copy as the statute requires, but it was not void. Had Richardson appeared and objected to the service, it would have been set aside as defective and irregular, and the court would have required new service before proceeding to render judgment. No objections were made, however, and the court, in rendering judgment against Richardson, held it sufficient, and as it was not void but voidable, it was not subject to collateral attack, and therefore the objections of the plaintiff in error are overruled.

The action was instituted in Richardson county where the defendant appears to have resided. It is charged in the affidavit for an attachment that he had absconded with the intent to defraud his creditors. If this were true it would be sufficient to sustain the attachment, although it afterwards appeared that he had not left the state. Ordinarily, it could not, in such case, be known whether he had left the state or not, or that he had clandestinely removed to another county, if such was the case, and it is sufficient to bring the action in the county where he formerly resided, and even if his residence is afterwards discovered in the state and service made upon him there, it will be sufficient, unless he appears and contests the right of the creditor to maintain the action. There is no cause for a rehearing and the motion is overruled.

MOTION OVERRULED.

THE other judges concur.

RECTOR-WILHELMY COMPANY V. PETER C. NISSEN
ET AL.

[FILED NOVEMBER 23, 1892.]

1. **Chattel Mortgages: CONDITION THAT MORTGAGEE MAY TAKE POSSESSION, CONSTRUED.** A chattel mortgage upon a stock of goods to secure the payment of four notes of \$200 each, payable respectively in thirty, sixty, ninety, and one hundred and twenty days from date, contained these words: "That in case of default made in the payment of the above mentioned promissory notes, or in case of attempting to dispose of or remove from said county of Douglas the aforesaid goods and chattels or any part thereof, or if at any time the said mortgagee, or its successor or assigns, should feel unsafe or insecure, then, and in that case, the said mortgagee," etc., "may take immediate possession of said goods," etc. *Held*, That the mortgagors must be in default or be about to do or have done some act which tends to impair the security, to authorize the mortgagee to take possession before the maturity of the notes.
2. **Conversion: JUSTIFICATION UNDER MORTGAGE: EVIDENCE.** While a mortgagee may prove any facts tending to show the conduct of the mortgagors in regard to the mortgaged property, he cannot be permitted to prove mere rumors or reports in regard to the same.
3. **Instructions examined, and *held*, to state the law correctly.**

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

Bradley & De Lamatre, for plaintiff in error.

Hall, McCulloch & English, contra.

MAXWELL, CH. J.

The pleadings in this case are as follows:

"Plaintiffs for cause of action against the defendant say: That said defendant is a corporation organized and doing business in the county of Douglas and state of Ne-

braska; that on and prior to the 22d day of June, 1888, said plaintiffs were engaged in the retail hardware business in the city of Omaha, Nebraska, and on said day had a stock of hardware, tinware, cutlery, and such other items of stock as are usually found in a retail hardware store, which said stock was of the value of \$3,000; that they were indebted on said last mentioned date to said defendant in the sum of \$800, and that the only other indebtedness said plaintiffs had at said date, or subsequent thereto, was as follows: To Lee-Clark-Andressen Hardware Company, \$150; to Simmons Hardware Company, \$132; that on said 22d day of June, 1888, said defendant prevailed upon said plaintiffs to, and said plaintiffs did, give to said defendant a chattel mortgage upon said stock of goods, to secure to them the payment of said indebtedness; * * * that by said mortgage said indebtedness was made payable as follows: \$200 in thirty days from date of mortgage, \$200 in sixty days, \$200 in ninety days, and \$200 in four months, said amounts being evidenced by promissory notes as described in said mortgage; that when said mortgage was given, and contemporaneous therewith, said defendant agreed with said plaintiffs that said mortgage should not be placed on record unless default was made in the payment of said notes mentioned in said mortgage, or some condition of said mortgage violated, and that said plaintiffs would be allowed to conduct their said business as before, and pay said notes out of the proceeds of said business; that long prior to the maturity of the first of said notes so secured, viz., on the 2d day of July, 1888, said defendant, without cause, and without any default made in the conditions of said mortgage by these plaintiffs, and in violation of their said contemporaneous agreement, and contrary to the terms of said mortgage, forcibly took possession of said stock of hardware and converted the same to its own use, against the protest of these plaintiffs, said defendant pretending to act under its said

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mortgage; that after giving said mortgage they did no act, nor were they at the time said property was seized as aforesaid about to do any act, nor had they in contemplation the doing of any act which would tend in any manner to impair the security of said mortgage, but on the contrary were using their utmost endeavors to be ready and would have been ready and able to meet said notes as they became due; that the stock so as aforesaid seized and controlled by defendant was, at the time of said seizure and conversion, of the value of \$3,000, and that no part of the same has been returned by said defendant to these plaintiffs, nor to any one for them, nor has any payment been made therefor, and that by reason of said unlawful seizure and conversion these plaintiffs have been damaged in the sum of \$3,000, the value of said stock of goods, and said defendant by reason thereof has become and is indebted to these plaintiffs in the sum of \$3,000, no part of which has been paid.

“Wherefore plaintiffs pray judgment against the defendant in the sum of \$3,000 with interest from July 2, 1888, and for costs of suit.”

A copy of the contract of partnership is set out, which need not be noticed.

The answer of the Rector-Wilhelmy Company is as follows:

“Now comes the defendant and for answer to the plaintiffs’ petition says it admits that it is a corporation duly organized under the laws of the state of Nebraska, and doing business in the county of Douglas, state of Nebraska; admits that on the day alleged in plaintiffs’ petition plaintiffs had a stock of hardware, etc., as set out in their petition, but denies that it was worth the sum of \$3,000; admits that plaintiffs were indebted in the various amounts to the parties set out in their petition, but denies that those amounts were their only indebtedness and alleges that they were indebted for the purchase price of their stock of goods

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to one firm in the amount of \$1,400 and that about \$200 of this became due on the 1st day of July, 1888, and \$200 every two months thereafter, and that plaintiffs, at the time of the filing of the said mortgage, were in default of their said July payment of \$200; alleges that plaintiffs at said time of filing said mortgage were insolvent; admits that about the time mentioned in plaintiffs' petition plaintiffs gave defendant a chattel mortgage upon their said stock of goods as security for their said indebtedness to defendant; admits that the notes were made payable as set out in plaintiffs' petition.

"Defendant denies that when said mortgage was given there was any contemporaneous agreement that said mortgage would not be placed on record, but alleges that it was represented to defendant by plaintiffs that William H. Alford, one of the plaintiffs herein, had \$1,000 due him from the old country which he expected daily to receive, and that so soon as he received this, which would not be more than a few days, he would pay off the entire indebtedness of plaintiffs to defendant; that after two or three days from the giving of said mortgage the said Peter C. Nissen told this defendant that he had no faith in Alford's ever receiving any money from the old country, and informed defendant that there were several judgments in the Cedar county (Nebraska) district court, and in the justice courts of Cedar county against him, and soon after the giving of said mortgage, and before the same was recorded, defendant was informed that one certain person from Wyoming was about to attach the entire stock of Nissen, Alford & Co., and at the same time defendant also learned that plaintiffs were endeavoring to sell their said stock of goods to the Omaha Repair Stove Works, and also, one Bonniwell, and defendant knowing of the large indebtedness of plaintiffs and of their insolvency and being advised that its mortgage would not secure its interest against any attachments if not recorded, and possession taken under it,

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and feeling insecure in that behalf did on the 2d day of July, 1888, put said mortgage on record and take possession of said stock of hardware, and defendant denies that said possession was taken without cause; denies that it was taken without any default on the part of plaintiffs; denies that it was contrary to the terms of the said mortgage; denies that it took forcible possession; denies that it converted the goods to its own use; denies that it was against the protests of plaintiffs, and alleges that defendant took possession of said stock by and with the full consent and approval of the plaintiffs; defendant denies that plaintiffs did no act, or were about to do any act, tending to impair the security of the defendant; denies that plaintiffs were using their best endeavors to, and would have been ready to meet and pay the said notes as they became due.

“Defendant denies that the stock of plaintiffs was of the value of \$3,000, but alleges that its value was about \$998.40; that the property taken under the said chattel mortgage was duly advertised for sale, and sold according to law, and that it brought the sum of \$998.40, and that defendant, by direction and with consent of plaintiffs, after satisfying its own claim and the necessary expenses of advertising, foreclosing, storage, rent, etc., turned over the balance to the Lee-Clarke-Andressen Hardware Company, of Omaha, Nebraska, to whom plaintiffs had given a second chattel mortgage on their stock of goods on the 2d day of July, 1888, and filed for record on the 3d day of July, 1888.”

The reply and other pleadings need not be noticed.

On the trial of the cause the jury returned a verdict in favor of the plaintiffs for the sum of \$1,771.78, and judgment was rendered in September for the sum of \$1,923.71.

It appears from the evidence that the stock of the plaintiffs below invoiced, when taken possession of by the defendant below, the sum of \$2,571.78.

The first error assigned is the refusal of the court below

to permit the defendant below to introduce in evidence rumors brought to it as to the insolvency of the plaintiffs below, and also as to what they had done and were about to do with their goods. These rumors were properly excluded. The defendant below had a right to show the facts as to what its debtors had done or were about to do with their goods, but mere reports as to their condition not based on facts are not admissible.

Second—It is claimed that the mortgagee had the right to take possession under the following clause in the mortgage: "And we, the said Nissen, Alford & Co., do hereby covenant and agree to and with the said Rector-Wilhelmy Company that in case of default made in the payment of the above mentioned promissory notes, or in case of our attempting to dispose of or remove from said county of Douglas the aforesaid goods and chattels, or any part thereof, or if at any time the said mortgagee or its successors should feel unsafe or insecure, then, and in that case, it shall be lawful for the said mortgagee, or its successors or assigns, by itself or agent, to take immediate possession of said goods and chattels wherever found, the possession of these presents being sufficient authority therefor, and to sell the same at public auction, or so much thereof as shall be sufficient to pay the amount due, or to become due, as the case may be, with all reasonable costs pertaining to the taking, keeping, advertising, and selling of said property, together with a reasonable sum for attorney's fees, the money remaining after paying said sum, if any, to be paid on demand to the party of the first part." It is claimed that under this provision the mortgagee might take possession at any time when it felt disposed to do so. We think not, however. The mortgage was given under an agreement that the mortgagors were to remain in possession and sell goods to be applied on the debt. It is true there is a provision that if the mortgagee felt insecure at any time it might take possession, etc. This, however, is

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not an arbitrary power to be exercised unless there has been some act done by the mortgagors, or such act is about to be done by them, the effect of which will be to weaken the security. (*Newlean v. Olson*, 22 Neb., 717.)

In the case cited it is said: "A chattel mortgage, like any other contract, is to be construed together, and the object is to ascertain with precision the mutual understanding of the parties. The whole instrument is to be viewed and compared in all its parts so that every part of it may be made consistent and effectual (2 Kent's Com., 555; *People v. Gosper*, 3 Neb., 285; *Barton v. Fitzgerald*, 15 East [Eng.], 541; *Merrill v. Gore*, 29 Me., 346), and the court in construing the contract should give effect to the provisions which carry out the evident intent of the parties. Here we find in this case credit was given, interest provided for in favor of the mortgagee, and an implied agreement on his part that if the mortgagor did not impair the security, he should be entitled to retain possession of the property until the money became due. This clearly was the contract and the intent of the parties, and the mortgagee should not be permitted to violate it. The words 'if the mortgagee shall at any time feel unsafe or insecure' do not mean that he may arbitrarily and without cause declare that he feels unsafe or insecure. If this were so a mortgagee might induce a mortgagor amply to secure a debt upon the implied promise that credit for a certain length of time would be given, and the instant after receiving the mortgage declare that he felt unsafe and insecure and proceed at once to foreclose the mortgage. Such a rule would place the mortgagor entirely at the mercy of the mortgagee, and in many, if not most cases, deprive the mortgagor of the very means by which he could pay the debt. To justify the mortgagee, therefore, in his action in declaring that he feels unsafe and insecure, where there is an implied contract that the mortgagor shall remain in possession, the mortgagor must be about to commit, or has committed, some act

which tends to impair the security; and unless such facts exist, the right does not become operative." What is said in that case seems applicable to this.

Third—It is claimed that the court erred in giving the following instructions:

"1. The chattel mortgage, as between the parties, was valid, but under the terms thereof the plaintiffs were entitled to retain possession of the property until default in the payment of some of the notes secured by the mortgage, or until defendant was justified in taking possession of the same as defined in the next instruction.

"2. To justify defendant in taking possession of the property before default in the payment of any of the notes secured by the mortgage one of these facts must have existed: First, that the plaintiffs were about to dispose of, or remove from this county, the mortgaged property, or some part thereof, without the consent of the defendant, or attempt so to do; or, second, that the plaintiffs had done, or were about to do, since the giving of the mortgage, some act without the consent of defendant, or that there had occurred some change in the affairs of plaintiffs, which act or change, in the judgment of a cautious, prudent man, situated as was defendant and in the same circumstances, would tend to impair the security of said mortgage and render the defendant unsafe in permitting plaintiffs to retain possession of said property.

"3. The burden is on the defendant to show one or the other of the facts named in the preceding instruction by a fair preponderance of the testimony. If you should believe from the testimony that either of said facts existed at the time of the taking of said property by defendant, your verdict must be for defendant, notwithstanding none of the notes were due at the time. In case you do not find either of said facts to have existed at that time, then the defendant has failed to show a justification for its act in taking the mortgaged goods, and your verdict should be for the plaintiffs.

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"4. In case you find for the plaintiffs, the measure of plaintiffs' damages is the value of their interest in the property on the 2d of July, 1888, with seven per cent interest from that day to September 23, 1889. In arriving at the said value you will take the value of the property as it was on the said day before defendant took possession, and from that value deduct the amount of defendant's lien by virtue of the mortgage, and the remainder will be the value of plaintiffs' interest on that day.

"5. In arriving at the value of the property you will disregard the evidence of what it sold for and arrive at its value from the evidence of the witnesses who testified in relation thereto, and from this testimony determine its fair market value in the city of Omaha on the day named."

These instructions, in our view, state the law correctly, and there was no error in giving the same. A party in obtaining a chattel mortgage on the promise, both in the mortgage itself and verbally, that all that is wanted is security for the debt, and time will be given to pay the claim, must act in good faith with the mortgagor, otherwise the mortgage would be obtained under false pretenses and the mortgagee, as soon as he had obtained it, could claim the possession. One or two cases of that kind have come to our notice in this court. The mortgage in this case seems to have been given in good faith and the mortgagors were endeavoring to comply with its terms, when the mortgagee before the debt was due, took possession and sold the goods. In such case the mortgagors were entitled to the full value of the goods, and the amount that they sold for at forced sale is no criterion to determine their value. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

**TOLERTON & STETSON COMPANY ET AL., APPELLEES, V.
 GEORGE W. McLAIN ET AL., APPELLEES, IM-
 PLEADED WITH GERMAN-AMERICAN SAVINGS BANK
 OF LE MARS, IOWA, APPELLANT.**

[FILED NOVEMBER 23, 1892.]

**Creditor's Bill: COLLATERAL PLEDGE OF PARTNERSHIP NOTES
 TO SECURE INDIVIDUAL DEBT: RIGHTS OF FIRM CREDITORS
 AGAINST PLEDGEE WITH NOTICE.** M. and H., doing business
 at C. under the name of M., sold their business and stock, tak-
 ing the notes of the purchasers payable to M. M. sold one of
 the notes to a bank and indorsed the same. He also delivered
 to the bank other firm notes to secure his private indebtedness.
 In a creditor's bill by creditors of the firm to subject the latter
 notes to payment of the firm debts, *held*, that the proof clearly
 showed that the officer of the bank taking the notes as security
 for a personal debt of M., a member of the firm, knew that they
 belonged to the partnership and that the creditors of the firm
 were entitled to the proceeds of such notes.

APPEAL from the district court for Dawes county.
 Heard below before KINKAID, J.

*Ira T. Martin, Barnes & Tyler, and Jenckes & Bane, for
 appellant.*

*Alfred Bartow, Spargur & Fisher, W. H. Fanning, E.
 S. Ricker, and A. W. Crites, for appellees.*

MAXWELL, CH. J.

It is claimed that on or about the 1st of April, 1890, one
 G. W. McLain borrowed from the German-American
 Savings Bank of Le Mars, Iowa, the sum of \$600. As
 security for such loan he pledged and delivered to the bank
 certain promissory notes, executed by other persons, which
 on their face were payable to him, amounting to about
 \$1,000. Afterwards, and during the month of June of the

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| 35 | 725 |
| 44 | 42 |
| 44 | 117 |
| 35 | 725 |
| 48 | 430 |
| 35 | 725 |
| 52 | 194 |

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same year, McLain again obtained from appellant \$665, \$1,200, and \$1,702.50, executing his several notes for the above mentioned sums, and as security therefor, and for the payment of some notes of his which had been executed prior to that date, pledged certain promissory notes executed by Manning & Gorton, payable to the order of said G. W. McLain, at the Bank of Crawford, at Crawford, Neb. At the same time he sold one of the Manning & Gorton notes to the bank outright. All of the above security notes were duly indorsed by him and delivered to the appellant herein. When the notes became due, on or about October, 1890, the appellant forwarded the same by way of the Wells, Fargo & Co.'s Express to the Bank of Crawford for collection. Thereupon the appellees, The Tolerton & Stetson Company and others, commenced actions in the several courts of Dawes county against G. W. McLain, at the same time suing out writs of attachment and causing the Wells, Fargo & Co.'s Express to be served with notices of garnishment. Such proceedings were had in the several cases that judgments were obtained against G. W. McLain, and the answer of the garnishee was taken.

On or about the 1st day of November, 1890, all of the appellees joined in a suit in the nature of a creditor's bill against G. W. McLain, Henry Henrichs, The Wells, Fargo & Co.'s Express, The German-American Savings Bank of Le Mars, Iowa, appellant herein, and T. E. Bradway, and filed their petition in the district court of Dawes county, alleging, in substance, that G. W. McLain and Henry Henrichs prior to that time had been doing business at Crawford, Nebraska, as copartners; that the several judgments which the plaintiffs had obtained as above stated were against the said firm of G. W. McLain and Henry Henrichs; that the said firm was insolvent and that executions on said judgments had been returned unsatisfied; that the notes pledged by the said G. W. McLain as collateral se-

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curity to the appellant, The German-American Savings Bank, were the property of the said firm of G. W. McLain and Henry Henrichs; that the same were taken by the bank without authority and in fraud of the rights of such firm and of the plaintiffs, with full knowledge of said facts on the part of the bank; that the same were subject to the attachment liens of the plaintiffs and the lien of the bank was subsequent and inferior thereto; that the same ought to be applied to the satisfaction of their said judgments, which petition concluded with the proper prayer for such relief. The German-American Savings Bank thereupon filed its answer to the said petition, denying the material allegations thereof; alleging that it took the notes in question as collateral security for the money borrowed by G. W. McLain without any knowledge or information that any one else had any interest in them whatsoever; that it purchased one of the notes in question and paid for the same the sum of \$2,000 outright, and concluding with a prayer that the proceeds of the notes be held subject first to their lien and applied to the payment thereof; that they recover their costs and for general equitable relief. No answer was filed by G. W. McLain, but Henry Henrichs filed an answer in which he alleges that the notes in question were the property of such firm; that they had been pledged without his knowledge or consent; that they ought to be applied to the satisfaction of the judgments to the exclusion of the rights of the appellant, and that he ought to have the balance of the proceeds of the notes for himself. Upon these issues the case was tried to the court and a decree rendered as follows:

“Said cause coming on to a hearing upon the petitions of the plaintiffs, the answers of the defendants, The German-American Savings Bank of Le Mars and Henry Henrichs, and the reply of the defendant The German-American Savings Bank of Le Mars, Iowa, and the evidence adduced and taken in open court upon the hearing

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by and in behalf of the respective parties, and the court being fully advised in the premises, now here finds that all the facts stated in the said petitions of the plaintiffs are true, and that they are entitled to the relief prayed in their said petitions; and that the facts stated in the answer of the defendant Henry Henrichs are true, and that he is entitled to the relief prayed in his said answer; and that the court finds that the defendant The German-American Savings Bank of Le Mars, Iowa, has a first lien upon the notes and securities and the proceeds thereof, described in the pleadings herein, for the sum of \$2,800, with eight per cent interest per annum thereon from the 10th of October, A. D. 1890, and is entitled to be first paid this aforesaid sum and interest due out of such proceeds; that the said plaintiffs are entitled to specific liens upon rest and residue of such notes and proceeds for the amount of their said several judgments and claims, with interest thereon from the date of such judgments, as therein provided, in the order of priority alleged and set forth in said petitions; that the plaintiff The First National Bank of Chicago, Illinois, had a specific lien upon such proceeds, by virtue of its attachment and garnishment, but which said action is still pending and undetermined; that after the payment of the aforesaid several sums of money out of the proceeds of such notes, the rest and residue of such proceeds, if any such there be, shall be divided between the defendant Henry Henrichs and the defendant Geo. W. McLain, or his representatives or assigns, in the proportion of $\frac{4}{8}$ to $\frac{4}{8}$, which said last named fractional proportion of such last named residue so belonging to the said George W. McLain, or his assigns, is hereby adjudged to be paid to the defendant The German-American Savings Bank of Le Mars, as its interest may appear. It is, therefore, now here ordered, adjudged, and decreed by the court that James C. Dahlman, the receiver heretofore appointed herein, shall first pay the costs of this suit, taxed at \$—,

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out of the proceeds of such said notes; that he next pay out of such proceeds the said sum of \$2,800, with eight per cent interest thereon from the 10th day of October, to the defendant The German-American Savings Bank of Le Mars; that he next pay out of such proceeds to the plaintiff The Tolerton-Stetson Company the sum of \$710.81, their judgment, together with the sum of \$33.58, their costs expended in obtaining the same, together with interest on the sum of \$354.31 thereof at the rate of seven per cent per annum from the 30th day of January, 1891, and on \$355.30 thereof at the rate of ten per cent per annum from said 30th day of January, 1891; that the said receiver do forthwith, out of the proceeds of said notes, pay over to the plaintiff James H. Walker the sum of \$648.45, his judgment, and further sum of \$18.65, his costs therein expended, together with interest thereon at the rate of — per cent from the 1st day of December, 1890; that the said receiver do forthwith, out of the proceeds of such notes, pay over to the J. T. Robinson Notion Company, the sum of \$110.25, its judgment, and the sum of \$14.65, its costs therein expended, together with seven per cent interest thereon from the 22d day of November, 1890; that the said receiver do retain in his hands, until the further order of the court, sufficient of such proceeds to pay the sum of \$652.46 claimed by the plaintiff The First National Bank of Chicago, together with seven per cent interest thereon, from the 22d day of June, 1890, \$50 probable costs; that the said receiver do forthwith pay over to the plaintiffs Finch, Van Slick & Co., out of such proceeds, the sum of \$509.21, their judgment, together with their costs therein expended taxed at \$22.83, with interest thereon at the rate of seven per cent per annum from the 30th day of January, 1891; that the said receiver do forthwith pay over to the plaintiff John T. Pirie, out of such proceeds, the sum of \$1,124.16, the total amount of his two judgments, and the further sum of \$30, his costs therein ex-

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pended, together with interest thereon at the rate of eight per cent per annum from the 4th day of November, 1890, on \$500, and eight per cent per annum from the 11th day of November, 1890, on \$500, and seven per cent interest from the 11th day of November, 1890, on \$124.16; that the said receiver do forthwith pay over to the plaintiffs C. M. Henderson & Co., out of such proceeds, the sum of \$176, their judgment, together with the sum of \$——, their costs therein expended, with interest thereon from the 30th day of October, 1890; that the said receiver do forthwith pay over to the plaintiffs C. Cotzian & Co., out of such proceeds, the sum of \$254.74, their judgment, together with \$14.20, their costs expended therein, with seven per cent interest thereon, from the 8th day of November, 1890; that the said receiver do forthwith pay over to the plaintiffs Sweet, Dempster & Co., out of such proceeds, the sum of \$454.60, their judgment, and the further sum of \$31.40, their costs therein expended, with seven per cent interest thereon from the 9th day of November, 1890; that the said receiver do forthwith pay over to said plaintiffs Sprague, Warner & Co., out of such proceeds, the sum of \$291.31, their judgment, together with the further sum of \$11.80, their costs therein expended, with seven per cent interest thereon from the 1st day of December, 1890; that the said receiver do forthwith pay over to the plaintiff Leroy Hall the sum of \$1,206.90, his judgment, together with the costs thereof taxed at \$27.78, with interest on \$687.25 thereof at the rate of seven per cent per annum from January 30, 1891, and on \$519.65 thereof at the rate of ten per cent per annum from January 30, 1891; that the said receiver do forthwith pay over to the Loak Glove Manufacturing Company, one of the creditors of the firm of G. W. McLain, the sum of \$73.25, with seven per cent interest thereon from December 20, 1890; that if, after making the payment of the said several sums out of such proceeds, there shall remain any residue thereof, the said

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receiver shall forthwith pay out said residue as follows: $\frac{4}{8}$ thereof to the defendant Henry Henrichs, and $\frac{4}{8}$ thereof to the defendant The German-American Savings Bank of Le Mars; and it is further ordered, adjudged, and decreed by the court that the said receiver do forthwith proceed to collect, by process of law or otherwise, all of the promissory notes and securities mentioned in the pleadings herein as belonging to the firm of G. W. McLain, and to dispose of the proceeds thereof in the order as above decreed, and that if any of said notes or any judgment recovered thereof shall prove to be uncollectible, said receiver is hereby ordered and directed to forthwith advertise and sell the same, after giving such notice of such sale as shall be required by law, and the proceeds of such sale shall be applied as hereinbefore specified."

The principal question in the case is the good faith of the German-American Savings Bank, of Le Mars, Iowa, in taking the notes in question.

Mr. Meyer, the president of the bank, testified as follows:

Q. Now, what was said, the exact agreement between you and George W. McLain, at the time that he deposited these notes as collateral in relation to your holding them for that purpose?

A. When we made the loan Mr. McLain offered these notes as collateral security for all the notes he was owing at the time.

Q. And what was the consideration which you have made to the bank to advance this additional money for McLain and take these collateral notes?

* * * * *

A. The consideration was, that if McLain would leave these notes as collateral security for all of his indebtedness to the bank we would make these additional advances.

Q. Yes, the advances that were made in May and June?

A. In June.

Tolerton v. McLain.

FISHER: Ask him what advances.

A. Those advances made in June.

Q. When was the paper left at your bank by Mr. McLain?

A. The 28th day of June.

Q. To whom was this payable?

* * * * *

Q. What, if any, notice or knowledge did you have of any claim or interest of any other person in this paper, other than George W. McLain?

A. Had no notice whatever that any other party had the least claim to this paper.

On cross-examination he testified:

Q. You think that he, McLain, told you they were given for the purchase price of the stock of goods at Crawford?

A. Yes, sir; I think he told me that.

Q. Did he tell you any of the circumstances as to the sale?

A. He told me how much money was paid and how many notes he had.

Q. What induced him to sell?

A. No, we didn't enter into further conversation, I don't think; don't remember anything about it.

Q. And you knew that they were a portion of the proceeds of the stock of goods at Crawford?

A. Yes, sir.

Q. Now I will ask you to state, Mr. Meyer, if you didn't know that this store, this general merchandise stock at Crawford, was the only business which G. W. McLain had at that place?

Witness: This what?

Q. This stock of goods.

Witness: Oh! the stock of goods at Crawford?

Q. Stock of goods at Crawford. You knew that was all the business he had at that place?

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A. That and his cold storage business there.

Q. I will ask you to state, Mr. Meyer, if you were present at a conversation in your banking establishment at Le Mars, Iowa, between George W. McLain and Mr. Henrichs, relative to this cold storage business and the incorporation of their business?

* * * * *

A. Yes, sir.

Q. You may state what that conversation was?

* * * * *

A. In the month of April, 1890.

Q. What time in the month of April? Any time to which you refer by saying that you were present?

A. Yes, I was present at a conversation at that time.

* * * * *

A. Why, we had a general talk about matters and things about their business, about the cold storage business, and what it would result in, and what they would make on a dozen eggs by carrying them from spring until fall, and about their incorporating and making a kind of incorporation.

Q. This conversation was engaged in by McLain, Henrichs and yourself, was it?

A. Yes, sir.

Q. At that time was there, or did they not rather agree as to the advisability of mortgaging their stock at Crawford, their stock of merchandise, and getting some money from you to put into their cold storage business?

* * * * *

A. They talked about borrowing some money.

Q. What security were they going to offer?

A. Well, now, I don't recollect just what security they were going to offer.

Q. I will ask you to state if they did not discuss the advisability of their still continuing in the general mer-

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chandise business at Crawford, as well as their cold storage business?

* * * * *

A. I think they did.

Q. Was it not suggested in this conversation that they would incorporate the cold storage business and would deposit their stock in the cold storage corporation with you as collateral as advanced by you, the money to be used in the cold storage business, as well as continuing in the general merchandise business?

* * * * *

A. Yes, sir; so far as the mercantile business was concerned, I think there was some talk of that kind.

Q. Was there not some talk at that time of incorporating their cold storage business, and their general merchandise business, under the corporate name of the United States Merchandise Company, and borrowing some money from you, pledging to you all their issues of stock or stock certificates in this corporation.

* * * * *

A. Why, there was some talk of that kind.

Q. Now, you say their business; whose business do you mean by their business?

A. That is something that Mr. McLain and Mr. Henrichs were talking about their going to do in the future, and there was some talk about their incorporating a merchandise business and issuing stock, and they talked more about it, and wanted to know something about what chance there would be in getting a little money on this stock and leave it in the bank, providing they incorporated; providing they changed their business to an incorporation.

Q. Whose business were they going to change?

A. That's something I don't know anything about.

Q. The other stock that they were going to change, whose stock do you mean by that?

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A. I did not understand that they were going to incorporate their stock of goods.

Q. You say that that stock of goods that they talked some of organizing?

A. And their cold storage business I am talking about.

Q. And their cold storage stock of goods?

A. I don't know anything about that.

Q. What stock of goods do you refer to when you state that they intended to change their business and incorporate their stock of goods with the cold storage business?

A. Well, I didn't intend to say that they were going to change their stock of goods into a cold storage business. I do not think I said so.

From other portions of his testimony it clearly appears that he knew Henrichs was a partner with McLain in the business at Crawford, although the business was conducted in the name of McLain. He also knew that they had sold out their business to Manning & Gorton; and that the notes he received to secure the personal debts of McLain were in fact partnership property of McLain and Henrichs. This being the case he is not an innocent holder and the rights of the firm creditors were superior to his. It is unnecessary to consider the other questions in the case as this is decisive of the rights of the parties. The judgment appears to be based upon the testimony and is right and is

AFFIRMED.

THE other judges concur.

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| 56 | 510 |

LEVI CLAY V. H. A. GREENWOOD ET AL.

[FILED NOVEMBER 23, 1892.]

1. **Chattel Mortgages: PARTNERSHIP PROPERTY: RIGHT OF ONE PARTNER TO MORTGAGE FOR PURCHASE MONEY.** B. and C. purchased a stallion for \$625, giving their notes therefor, signed by two sureties, and due in eighteen and thirty months. After some delay the first note was paid by C., as was claimed, largely from money derived from the horse. The sureties insisted on the payment of both notes and the testimony shows that B., in his own name, with the assent of C., mortgaged the horse to G., to obtain money to pay the second note and the money was so applied. *Held*, That G. had a lien upon the horse for the amount of said loan and interest.

2. **Review: OBJECTIONS TO THE FORM OF THE PLEADINGS** must be made in the trial court to be available in the supreme court.

. **ERROR** to the district court for Gage county. Tried below before APPELGET, J.

Hugh J. Dobbs, for plaintiff in error:

A mortgage of personal property by one partner in his individual name passes no title. (Parsons, Partnership, sec. 95; *Clark v. Houghton*, 12 Gray [Mass.], 38; *Butterfield v. Hemsely*, Id., 226; *Cummings v. Parish*, 39 Miss., 412; *Lockwood v. Beckwith*, 6 Mich., 168; *Chapman v. Devereux*, 32 Vt., 616; *Gates v. Watson*, 54 Mo., 585.)

Winter & Kauffman, and *A. D. McCandless*, contra:

The mortgage was given to secure a partnership debt, and is valid, though executed by one partner only. (*Gernon v. Hoyt*, 90 N. Y., 631; *Getchell v. Foster*, 106 Mass., 42; *Winship v. Bank*, 5 Pet. [U. S.], 529-532; *Theilen v. Hann*, 27 Kan., 778; *U. S. Bank v. Binney*, 5 Mason [U. S.], 176; *National Bank v. Ingraham*, 58 Barb. [N. Y.], 290.)

MAXWELL, CH. J.

This is an action of replevin brought by Greenwood against Clay and Blake to recover possession of a stallion. The testimony tends to show the following facts:

On the 26th day of March, 1889, Levi Clay and M. C. Blake purchased in partnership a three-year old stallion of E. L. Williams, at Axtell, Kansas, for \$625, for which they gave two promissory notes, due respectively in eighteen and thirty months. The notes were signed by Levi Clay and M. C. Blake as principals and Ed. Oates and Peter Weir as sureties. To indemnify the sureties Clay gave them a chattel mortgage on some mules. Afterwards Blake and Clay gave a chattel mortgage to Wilson as additional security for the two original purchase notes. The horse was taken to Barneston, Nebraska, and kept in Clay's barn and bred to mares in regular course of business, during the season of 1889 and 1890. Clay managed the horse, collecting service money. In the fall of 1890 feed was scarce and Clay turned the horse over to Blake, who wintered him. Sometime after Clay gave a chattel mortgage to the sureties Oates and Weir, he gave another first mortgage on the same mules to Greenwood, and afterward, in conjunction with Greenwood, shipped the mules to Chicago and sold them; all without the knowledge and consent of Oates and Weir, who held the first mortgage. This alarmed them and they threatened to prosecute Clay for disposing of mortgaged chattels, and they insisted that the notes be paid at once and release them from liability thereon, although one note was not due until September 26, 1891. Clay turned over to these sureties money derived from the sale of the mules, nearly enough to pay the first note, and they so applied it, but required that the other note be paid also. Blake and Clay agreed that the money should be raised by mortgaging the horse, and pay off the notes and mortgage to Wilson, and release the

Clay v. Greenwood.

sureties. In pursuance of this agreement, and for the purpose of relieving Clay from his entanglement with the sureties, Blake went to Greenwood and borrowed \$324 and gave him a chattel mortgage on the horse, signed by himself only, but represented to Greenwood that the money was to be used in paying off the notes and mortgage then on the horse, and it was so applied. About the 1st of April, 1891, in default of payment, Greenwood commenced foreclosure proceedings; took nominal possession of the horse and advertised him for sale on foreclosure, but agreed to leave the horse in the possession of Blake and Clay during the time of advertising, and arranged with Blake to hire some one to keep him during that time, and \$25 out of the money realized on the sale was to be paid for such keeping. Blake told Clay that if he would keep him he could have the \$25, and under this arrangement Clay took possession of the horse and when the day of sale arrived refused to give him up. Greenwood thereupon commenced this suit in justice court and by the justice it was certified to the district court, and there tried to the court without a jury. The court found for the plaintiff Greenwood and rendered judgment in his favor.

The principal contention on behalf of the plaintiff in error is, that the mortgage being signed by but one partner, does not pass the legal title, and therefore that Greenwood cannot recover. There is testimony in the record tending to show that the money was borrowed for the firm, and that the plaintiff in error assented to the execution of the mortgage; but however this may be, there is no doubt that Greenwood furnished the money to pay the second of the partnership notes and has a claim upon the property for that amount, for which with interest he is entitled to a lien on the property. It is impossible in this action to adjust the accounts between Clay and Blake, as a considerable part of the proof was directed to that purpose.

Some objection is made to the form of the pleadings, but

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it should have been urged in the court below to be available in this court. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

**ERASTUS A. DEMING, APPELLEE, V. WILLIAM H. MILES
ET AL., APPELLANTS.**

| 35 739
| 56 619

[FILED NOVEMBER 23, 1892.]

1. **Registration: FILING DEED OPERATES AS CONSTRUCTIVE NOTICE: GRANTEE UNAFFECTED BY NEGLIGENCE OF OFFICER TO RECORD.** Where a party files a deed properly executed and acknowledged for record with the proper officer, he is not bound to see that the officer performs his duty by actually recording it, nor is he responsible to other parties for the officer's neglect of his duty. The proper filing of such deed for record operates as constructive notice to all subsequent purchasers and mortgagees, although the officer may fail to comply with the requirements of the statute with respect to the recording of the instrument.
2. ———: ———: **DESTRUCTION OF RECORDS BY FIRE.** Where a deed properly executed and acknowledged is filed and recorded in the proper office, it is thenceforth notice to all the world, even though the record book containing it may be totally destroyed by fire.
3. **Real Estate: LIFE ESTATE OF HUSBAND BY CURTESY MAY BE CONVEYED, OR SOLD ON EXECUTION.** The life estate of a husband as tenant by the curtesy is subject to seizure and sale on execution against him. A tenant by the curtesy may likewise convey his title by deed or mortgage.
4. ———: **DESCENT.** *Held*, That on the death of Mrs. L. A. M., in 1880, all the real estate of which she died seized descended, subject to W. H. M.'s right to an estate by curtesy therein, to their daughter L. M.

APPEAL from the district court for Frontier county.
Heard below before COCHRAN, J.

J. L. White, and A. S. Sands, for appellants.

R. M. Snively, contra.

NORVAL, J.

This action was brought in the court below by appellee against William H. Miles and Nellie E. Miles, to foreclose a mortgage executed by them upon the west half of the southeast quarter and the east half of the southwest quarter of section 1, town 7 north, of range 28 west of the sixth principal meridian. The district court permitted Laura Miles, the minor child of the said William H. Miles by a former wife to intervene in the action. A guardian *ad litem* was appointed for the minor, who filed an answer setting up therein that at the time of the execution of the mortgage, the said Laura Miles was the sole owner in fee-simple of the land in controversy, having acquired title thereto by inheritance from her mother; that said mortgage conveyed no interest in the lands therein described, and is a cloud upon her title to said premises. The answer closes with prayer that the mortgage be canceled and that the title to the real estate be quieted in said minor. A reply was filed by the plaintiff. Upon the trial the court found that at the time of the execution of the mortgage, said William H. Miles was the owner in fee-simple of said real estate; that the mortgage was valid and binding, and a decree of foreclosure and sale was entered for \$628.09. For and on behalf of the said minor this appeal is prosecuted.

The record before us shows that on the 11th day of January, 1879, the defendant William H. Miles was the owner in fee-simple of the real estate covered by the mortgage, and on said day, by deed of general warranty, he

Deming v. Miles.

conveyed the same to one Laura C. Murphy, which deed appellant contends was duly recorded on the 4th day of March, 1879; that on the 13th day of said month the said William H. Miles was married to said Laura C. Murphy; that on the 22d day of January, 1880, the appellant Laura Miles was born as the lawful issue of said marriage, and that on the 27th day of the same month said Laura C. died intestate, leaving surviving her, as her sole and only heir, the said minor. Subsequently, the said William H. Miles was married to one Nellie E. Murphy, and they, on the 16th day of August, 1883, executed, acknowledged, and delivered the mortgage in suit to secure a loan of \$500, which mortgage was recorded on the 18th day of September, 1883, in the mortgage records of Frontier county.

Appellant contends that the said deed of January 11, 1879, from Miles to Murphy, was duly filed and recorded on the 4th day of March, 1879, in the office of the county clerk of the county where the lands therein described are situated. It is undisputed that in the early part of the year 1883 the court house and records of Frontier county were entirely destroyed by fire. Subsequently, but prior to the making and recording of the mortgage for the foreclosure of which this action was instituted, the records with reference to the lands covered by said mortgage were so restored as to show that the title to the lands stood in the name of William H. Miles. The said deed from Miles to Laura C. Murphy at that time did not appear of record, and appellee insists it was not established that it was ever on record prior to the making of the mortgage. Upon the trial the original deed was produced and put in evidence with the indorsements thereon. Upon the back of the instrument is to be found the following certificate:

"Filed for record this 4th day of March, A. D. 1879, eleven o'clock A. M., and entered in numerical index of deeds. Recorded this 4th day of March, 1879.

"A. L. MORGAN,
"County Clerk."

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It was also proven by Mr. Morgan, who was the county clerk of Frontier county in 1879, that the above certificate is in his handwriting and was made while he was such clerk. Mr. Morgan further testified, in answer to the question, "You may state whether you received that deed for record at the time stated, and whether you spread it at large upon the records of the county?" that "It was undoubtedly received then according to the indorsement as filed, but I see there is no page mentioned or the number of the deed record, and I cannot say positively whether it was recorded or not. I was just commencing with the business and not very well acquainted with it at the time. It was not customary to place 'recorded this day,' etc., until after the record was done, and then place the name of the record and page; but I see the page is not mentioned here. Whether it was recorded I do not know; I cannot say positively whether it was or not."

Although Mr. Morgan's testimony does not show that the deed was in fact spread upon the deed records of the county, the fact of its being delivered to the county clerk for such purpose clearly appears from the testimony of the witness as well as by the indorsement upon the back of the instrument.

By section 15 of chapter 73 of the Compiled Statutes, entitled "Real Estate," it is provided that "every deed entitled by law to be recorded shall be recorded in the order and as of the time when the same shall be delivered to the clerk for that purpose, and shall be considered recorded from the time of such delivery." Whether the deed in question was in fact recorded is quite immaterial so far as the rights of appellant are concerned. Where a party files a deed or mortgage, properly executed and acknowledged, for record with the proper officer he has complied with the law, and he is not bound to see that the officer performs his duty by actually recording it, nor will the law hold him responsible to the parties for the omission or neg-

lect of the officer to discharge his duty. The proper filing of the deed for record operated as constructive notice to all subsequent purchasers and mortgagees. (*Perkins v. Strong*, 22 Neb., 725.)

We are, however, satisfied from other testimony contained in the bill of exceptions that the deed was actually recorded. It appears from the testimony of W. L. McClay, who was the county clerk of Frontier county during the year 1882, that between the 15th and 25th days of December of that year, at the request of Burton & Harvey, of Orleans, he examined the records of his office for the purpose of ascertaining what property, real as well as personal, was owned by said W. H. Miles; that upon such examination he found that the title to the land in litigation stood of record in the name of Laura C. Murphy, which was the maiden name of Mr. Miles's first wife. No testimony was introduced by appellee to controvert the fact of the recording of the deed, but he insists that the evidence introduced by appellant is insufficient to establish that the instrument was ever recorded. His contention must be overruled. The fact that the record of this deed was destroyed does not affect the rights of appellant. There can be no doubt that, where a deed, properly executed and acknowledged, is duly filed and recorded, it is thenceforth notice to all the world, although the record may be totally destroyed by fire. Such is the uniform adjudication in this country. (*Wade on Notice*, sec. 157; *Alvis v. Morrison*, 63 Ill., 181; *Shannon v. Hall*, 72 Id., 354; *Gammon v. Hodges*, 73 Id., 140; *Myers v. Buchanan*, 46 Miss., 397.)

To our mind it is perfectly plain that the mother of appellant at the time of her death was the owner in fee simple of the real estate involved in this litigation. Under the law in force at the time of the death of the mother the husband, William H. Miles, took only a life estate in the lands, and, subject to his right of curtesy, they descended to appellant as the sole and only heir at law of Laura C.

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Miles, deceased. The mortgage did not convey the fee-simple title, and the district court erred in so finding and in entering the decree it did, for the reason that William H. Miles only owned an estate by the curtesy. The life estate of a husband as tenant by the curtesy in the real property of his wife of which she died seized is subject to seizure and sale on execution against him. Likewise a tenant by curtesy may convey his title by deed or mortgage. (*Forbes v. Sweesey*, 8 Neb., 525; *Lessee of Cunby v. Porter*, 12 O. St., 79; *Shortall v. Hinckley*, 31 Ill., 219; *Rose v. Sanderson*, 38 Id., 247; *Lang v. Hitchcock*, 99 Id., 550; *Borzarth v. Largent*, 128 Id., 95; *Edmunds v. Leavell*, 3 S. W. Rep. [Ky.], 134.) It is clear from the foregoing authorities that the mortgage covered the interest of the mortgagor in the premises. Appellee is entitled to a foreclosure and sale only of the life estate of the defendant William H. Miles.

It is claimed that the mortgage is invalid for the reason that at the time of the death of Laura C. Miles the premises were occupied by her and her husband as a family homestead, and the husband therefore could not incumber the same. As no such issue is tendered by the pleadings in the case we will not take the time to consider the point raised in the brief of counsel.

Lastly, it is urged that William H. Miles has no estate by the curtesy in the premises for the reason appellant's mother acquired title thereto directly from him by a deed of general warranty, and the cases of *McCulloch v. Valentine*, 24 Neb., 215, and *Pool v. Blakie*, 53 Ill., 495, are cited in the brief of counsel in support of the proposition. An examination of these authorities will show that they are not in point. In the case in our own reports one Ebenezer McCulloch, by his last will and testament, provided that a certain farm owned by the testator should be sold by his executors and the money arising therefrom be equally divided among his daughters, stipulating that the share going to his daughter, Elizabeth Pemberton, should be re-

Deming v. Miles.

tained by his sons, Ebenezer Z. and George C., who were by the will appointed trustees for that purpose, and who were "to retain the same in trust for the benefit of said Elizabeth Pemberton and her children, her husband to have no control over the same, but that the said trustees might, with the consent of said Elizabeth Pemberton invest the same as they should deem best, so that the daughter and her children shall have the benefit of the same without the control of her husband." The farm was sold in accordance with the provisions of the will and with the share of the funds intended for Elizabeth Pemberton the trustees purchased a quarter section of land in Hamilton county in this state, and a deed therefor was taken in their own names as trustees, the *habendum* clause of the deed reading, "To have and to hold the said real estate, with the appurtenances, to the said second parties as trustees of said Elizabeth Pemberton, they being appointed as trustees by the will of their father, * * * for her sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children, the said trustees having the power to sell and convey said land, or any part thereof, on the written request of said Elizabeth Pemberton, and her joining with them in any such conveyance." Subsequently Elizabeth Pemberton died intestate, leaving her husband and their three children surviving her. Afterwards it was sought to sell the lands under an execution against the husband. This court held that he took no estate in the lands as tenant by the curtesy. The Illinois case is quite similar to the one reported in 24 Nebraska. In each case the instrument construed specified in effect that the property therein described was for the sole and separate use and benefit of the wife, and that the husband should have no interest and title in or control over the same. But the deed under consideration in the case at bar contains no limitations whatever. The fact that William H. Miles was the grantor in the deed does not bar his right to an estate

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by curtesy, since such right was not limited by the conveyance. (*Robie v. Chapman*, 59 N. H., 41; *Soltan v. Soltan*, 6 S. W. Rep. [Mo.], 95.)

The decree of the district court is reversed and the cause is remanded to said court with instructions to enter a decree of foreclosure and sale only of the life estate of the defendant William H. Miles in the mortgaged premises and quieting the title to the property in the appellant Laura Miles, subject to said estate by the curtesy.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CARY A. MANKER V. L. P. SINE.

[FILED NOVEMBER 23, 1892.]

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| 38 | 205 |
| 35 | 746 |
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| 49 | 749 |
| 51 | 260 |
| 53 | 398 |
| 54 | 164 |
| 35 | 746 |
| 59 | 162 |

1. **Replevin: JUDGMENT: ALTERNATIVE FORM.** In an action of replevin, where the property has been delivered to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative for a return of the property, or the value thereof, in case a return cannot be had, or the value of the possession of the same, and for damages for the unlawful detention. The statute requiring the judgment to be in the alternative form is imperative.
2. **Instructions: SUFFICIENCY OF EVIDENCE.** *Held*, That the cause was submitted to the jury under proper instructions; that the instruction as requested by plaintiff was not applicable to the case, and that the evidence sustains the verdict.
3. **Direction for Alternative Judgment.** The judgment not being in the alternative form, the cause is remanded to the court below to render the proper judgment upon the verdict returned by the jury.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

A. N. Sullivan, for plaintiff in error.

Wooley & Gibson, contra.

NORVAL, J.

This was an action of replevin instituted by plaintiff in error to recover the possession of a newspaper printing outfit. The property was taken under the replevin writ, and the possession thereof delivered to the plaintiff. There was a trial to a jury, who returned a verdict finding the right of property and right of possession of an undivided half interest of the property in the defendant at the commencement of the action, and assessed the value of his said interest at the sum of \$175, with damages at \$1 for the unlawful detention. Plaintiff filed a motion for a new trial, which was overruled by the court, and thereupon the following judgment was rendered:

“It is therefore considered and adjudged by the court that the said defendant recover of and from the said plaintiff the sum of \$175 as heretofore by the verdict of the jury found due him as the value of the property in controversy, and also the sum of \$1 as damages for the unlawful detention of the same, and his costs in and about this suit in that behalf expended, taxed at \$46.33, for which execution is awarded.”

A reversal is asked on the ground that the verdict is not sustained by sufficient evidence.

On the 24th day of May, 1889, the property was owned by the plaintiff and one L. P. Sine, each owning an undivided one-half thereof. On that day defendant purchased Mr. Sine's interest for the sum of \$250, the plaintiff furnishing defendant the money for that purpose. The defendant also gave plaintiff at said time his promissory note for the said sum of \$250, payable \$10 each month, with interest at ten per cent. To secure the payment of the note defendant executed and delivered to plaintiff a written instrument which is, in effect, a chattel mortgage upon his interest in the property, by the terms of which plaintiff had the right

Manker v. Sine.

to take possession of the property whenever he should feel unsafe or insecure, or in case defendant failed to make the payments as agreed. Plaintiff did not upon the trial claim the right of possession under the terms of the mortgage, but insisted that on the 29th day of October, 1889, by mutual agreement between the parties, plaintiff took the property in settlement of subsequent payments on the note, and that all past due payments were to be paid by defendant, and that afterwards defendant retook possession of the property and then refused to surrender the same. The testimony introduced by the plaintiff upon the trial tended to sustain this theory of settlement. The defendant's testimony is to the effect that no such settlement was made, but that, on the date last stated, he paid plaintiff all sums past due upon the note, which had not been previously paid. Plaintiff contends, and so testified, there was then past due \$17.12, while defendant testified that plaintiff had failed to give him credit for all moneys paid; that in fact there was then only due the sum of \$11.76, and that he at that time gave plaintiff \$18.75, and requested that he be given credit on the note for the amount past due thereon, and that the remainder be applied on his other indebtedness to him. Plaintiff admits receiving the \$18.75, but claims that he was directed to apply \$3.50 on account for a mattress, \$3 as a balance due on a \$15 note, and the balance on the \$250 note above referred to. By the first instruction the jury were told that if they found from the evidence that the defendant surrendered the property to the plaintiff upon the agreement that he was to be released from further liability on his indebtedness to the plaintiff, then they should return a verdict finding that the plaintiff was entitled to the possession of the property. The conflicting evidence was fairly submitted to the jury by the court, and the verdict being supported by competent legal evidence, and not being against the weight thereof, will not be set aside.

It is conceded that the value of the undivided one-half of the property was \$175, the amount assessed by the verdict as being the value of the defendant's interest therein. The fact that plaintiff had a mortgage upon the property for more than the value thereof is no reason why defendant's interest in the property should have been assessed at less than what the property was actually worth. It is not the law, that when a mortgagee replevies the property from the mortgagor before any conditions of the mortgage have been broken entitling the former to the possession of the same in case of the verdict in favor of the defendant in the replevin suit, the amount of a mortgage debt must be deducted from the value of the property in determining the interest of the defendant. It is obvious that such a rule would enable the mortgagee to collect his debt before the same becomes due.

Complaint is made that the second instruction given by the court on its own motion is erroneous, in that it ignored the proposition that if the defendant had not made the payments as required by the terms of the mortgage, or that the plaintiff deemed himself unsafe and insecure, then plaintiff was entitled to the possession of the property. There was no error in failing to so charge the jury, since plaintiff, neither in his petition nor upon the trial, claimed the right of possession by reason of the mortgage, but as the absolute owner of the property. In his petition he alleges that he is the owner of the property, and upon that theory the case was tried.

Error is assigned because the court refused to give the following instruction to the jury, requested by the plaintiff: "The court instructs the jury, as a matter of law, that a sale and delivery of goods on conditions, such as are contained in the bill of sale, or lease offered in evidence, to-wit, that the property is not to vest until the purchase money is paid, does not pass the title to the vendee until the condition is performed, and a vendor, in case the condi-

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tion is not fulfilled, has a right to repossess himself of the goods against the vendee; and in this case the court instructs you that by the terms and conditions contained in said bill of sale or lease the title and ownership of the property in controversy did not pass until the payment of the purchase price." Conceding that the above request is correct as a legal proposition, yet there was no error in refusing to so charge the jury, for the reason that it was not applicable to the facts proven. The evidence shows that the transaction was not a conditional sale, but that the instrument given by defendant to plaintiff was, in effect, a chattel mortgage to secure the payment of the money borrowed by the former of the latter. Defendant did not purchase the property of plaintiff, but from Sine, so that we are unable to perceive upon what the plaintiff bases his claim that the property was sold and delivered by him to defendant upon conditions that the title and ownership thereof should not pass until the purchase price was paid. The only inference that can be drawn from the evidence is that the property was pledged to the plaintiff as security.

The judgment is erroneous because it was rendered for money absolutely, and was not in the alternative, for a return of the property, or the value thereof in case a return could not be had, as required by section 191a of the Code. The statute is imperative, that where the property has been delivered to the plaintiff in replevin, in case a verdict is returned for the defendant, the judgment must be for the return of the property, or its value in case it cannot be returned, or the value of the defendant's possession. This statutory provision is mandatory. (*Hooker v. Hammill*, 7 Neb., 231; *Lee v. Hastings*, 13 Id., 508.) In the last case cited there was a stipulation that the property could not be returned, and yet the court held that it did not preclude the necessity of an alternative judgment.

It is argued by counsel for defendant that the statutory provision for alternative judgment is for the benefit of the

defendant alone, and that he has the right to waive a return, and take judgment for the value. Even if this were the true interpretation of the statute, which we do not concede, the record does not disclose that the defendant waived in the court below a return of the property, while it appears that he did pray a return of the property in his answer. Having requested that, the plaintiff had a right to expect, in case the verdict was against him, that the judgment would be in the statutory form. It does not appear that the property replevied cannot be returned. We cannot say that the judgment in the case at bar was to plaintiff's benefit. For aught that appears it might be to his injury to pay for the property instead of returning it. We think the plaintiff has the right to insist that the judgment shall be in the alternative. (*Singer Mfg. Co. v. Dunham*, 33 Neb., 686, 690; *Glann v. Younglove*, 27 Barb. [N. Y.], 484; *Fitzhugh v. Wiman*, 9 N. Y., 559; *Wood v. Orser*, 25 Id., 348; *Hall v. Jenness*, 6 Kan., 356.) We are aware that there are cases in other states which hold that the provisions of the statutes requiring a judgment in the alternative in replevin are exclusive for the benefit of the defendant, and that he may waive a return of the property and take judgment merely for the value thereof if he chooses; but such decisions are based upon statutory provisions materially different from our own, and are therefore not entitled to weight as authorities in this state.

The error in the form of the judgment in the case at bar will not necessitate a new trial, but a proper judgment may be rendered upon the verdict. The judgment is therefore reversed and the cause remanded with instructions to the court below to enter a judgment in the alternative for a return of the property or the value thereof found by the jury, in case no return can be had, and for the damages assessed by the jury for the unlawful detention, with costs.

REVERSED AND REMANDED.

THE other judges concur.

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GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, v. S. P. ROUNDS, JR.

[FILED NOVEMBER 23, 1892.]

1. **Fire Insurance: AUTHORITY OF AGENT: AGENT'S CLERK.**

An agent for an insurance company, possessing the power to contract for risks, write and deliver policies, collect premiums, and make indorsements upon policies, employed a clerk and authorized him to transact the business for him in the agent's name. The clerk, in the line of his employment, wrote the policy in suit, signing the agent's name thereto, and the risk was reported to and approved by the company. Afterwards the agent indorsed upon the policy his approval of the assignment thereof by the insured to the purchaser of the property. Subsequently the clerk indorsed upon the policy, permission for additional concurrent insurance, for the discontinuance of the night watchman and watchman's clock, and any loss under the policy was made payable to the mortgagees, which indorsement was reported to the company in the agent's name, and the attention of the latter was called thereto, who acquiesced in the same. In an action on the policy it was *held*, that the act of the clerk in making the indorsement was the act of the agent and was binding upon the company to the same extent as if the same had been made by the agent personally.

2. ———: ———. A local agent of an insurance company, who has the power to make a contract of insurance, has authority to consent to additional insurance and to accept notice of a change in the risk and of the placing of incumbrances on the property, unless there is some provision in the policy to the contrary.

3. ———: ———: **ASSIGNMENT OF POLICY.** The indorsement upon a policy by such an agent of his approval of the assignment of a policy is binding upon the company, where the policy contains a clause that "no assignment thereof shall be valid unless the same is indorsed thereon and approved by the company, or its regular agent, in writing."

4. ———: **CANCELLATION OF INSURANCE.** In an action on an insurance policy which contained a stipulation reserving to the company the right to cancel the risk at any time by returning the premium *pro rata* for the unexpired term, or tendering it to the representative of the insured, it was *held*, that to rescind the policy the company must notify the assured of the cancellation, and pay or tender to him the amount of the unearned premium.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

James R. Wash, Adams & Scott, and I. W. Lansing, for plaintiff in error:

Local agent is without authority to waive conditions of insurance policy after issue, when he is simply empowered to fix rates, countersign and deliver policies, and collect premiums. (*Bowlin v. Hekla Fire Ins. Co.*, 31 N. W. Rep. [Minn.], 859; *Kyte v. Commercial Union Assurance Co.*, 10 N. E. Rep. [Mass.], 518; *Hankins v. Rockford Ins. Co.*, 35 N. W. Rep. [Ill.], 34; *Strickland v. Council Bluffs Ins. Co.*, 66 Ia., 466; *Gladding v. California, etc., Ins. Co.*, 66 Cal., 6; *Enos v. Sun Ins. Co.*, 67 Id., 621; *Hamilton v. Aurora Ins. Co.*, 15 Mo. App., 59; *Leonard v. Michigan Ins. Co.*, 97 Ind., 299.) Company is not required, on being informed of insurance without its consent in another company contrary to policy, to return the premium. (*Phoenix Ins. Co. v. Stevenson*, 8 Ky., 150.)

Tibbets, Morey & Ferris, and S. S. Parks, contra:

General agents of insurance companies, authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to exercise the same powers. (*Duluth Nat. Bank v. Fire Ins. Co.*, 85 Tenn., 76; *Bodine v. Ins. Co.*, 51 N. Y., 117; *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill., 463; *Cont. Ins. Co. v. Ruckman*, 127 Ill., 364.) Notice of the intention to cancel must be given by the insurer to the insured. (*Chadbourne v. German Ins. Co.*, 31 Fed. Rep., 533; *Farnum v. Phenix Ins. Co.*, 23 Pac. Rep. [Cal.], 872.) Until proportionate part of the premium be returned or tendered to the insured, the policy remains in force. (May, Insurance [3d ed.], sec. 67; *Franklin Ins. Co. v. Massey*, 33 Pa. St., 221; *Peoria, etc., Ins. Co. v. Botto*, 47 Ill., 516;

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White v. Conn. Ins. Co., 120 Mass., 330; *Lattan v. Royal Ins. Co.*, 45 N. J. L., 453; *Home Ins. Co. v. Curtis*, 32 Mich., 402; *Albany City Ins. Co. v. Keating*, 46 Ill., 395; *Van Valkenburgh v. Lenox Ins. Co.*, 51 N. Y., 465; *Griffey v. N. Y. Cent. Ins. Co.*, 100 Id., 417.)

NORVAL, J.

This action was brought upon a fire insurance policy issued by the plaintiff in error, April 16, 1889, to the Gazette-Journal Company, of Hastings, whereby it insured said company to the amount of \$1,000 on its printing outfit for the term of one year. After the issuing of the policy the property was sold to S. P. Rounds, Jr., and the policy was assigned to him on June 1, 1889. The property was destroyed by fire on the 29th day of July, 1889. The defense was that the insured had violated certain conditions of the policy, whereby the policy became void. Plaintiff below recovered a judgment for \$650, and the defendant company prosecutes a petition in error to this court. It is conceded that the judgment is for the proper amount, if plaintiff below is entitled to recover anything. The policy contained, among others, the following stipulations:

"1. If the insured shall cause the building, goods, or other property, to be described in this policy otherwise than as they really are, or make any false representations as to the character of the hazard, this policy shall be void; or if the risk shall be increased from any cause whatever within the knowledge of the insured during the continuance of this policy, unless notice thereof be given to this company, and consent to such increased hazard be indorsed hereon upon the payment of proper additional premium therefor, this policy shall be of no force.

"3. No assignment of this policy shall be valid until the assignment is indorsed hereon and approved by this company, or its regular agent, in writing, and this company

reserves the right to approve the transfer or not; and in case of such assignment or transfer of this policy, or of any interest in it, without such consent, this policy shall immediately cease.

“5. When property insured by this policy, or any part thereof, shall be alienated, or incumbered, or in case of any transfer or change of title to the property insured or any part thereof, or of any interest therein, without the consent of the company indorsed hereon, or if the property hereby insured be levied upon or taken into possession or custody under any legal process, or if the title or possession be disputed in any proceedings at law or equity, or if the property be advertised for sale under a deed of trust or mortgage, or if a suit be commenced to foreclose a mortgage on the property insured, or if voluntary or involuntary proceedings in bankruptcy by or against the insured be commenced, this policy shall at once cease to be binding upon this company.

“9. The insured under this policy must obtain consent of this company for all additional insurance or policies, valid or invalid, made or taken before or after the issue of this policy on the property hereby insured, and for all changes that may be made in such additional insurance and have such consent indorsed on this policy, otherwise the insured shall not recover in case of loss; and in case of any other policies, whether made prior or subsequent to the date of this policy, the insured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby bears to the whole amount of policies thereon; and in case of the insured holding any other policy in this or any other company on the property insured subject to the conditions of average or co-insurance, this policy shall be subject to average and co-insurance in like manner, at the option of this company.”

It is contended that the policy was invalid because the Gazette-Journal Company sold the property insured to the

German Ins. Co. v. Rounds.

defendant in error without the written consent of the insurer, and for the further reason that defendant in error took out other insurance without the written consent of the company indorsed on the policy. The policy, when issued, authorized concurrent insurance to the amount of \$8,000, and policies aggregating that sum were in force at the time defendant in error purchased the property. Subsequently he placed \$2,000 additional insurance. Prior to doing so, the policy in suit was taken to the office of L. M. Campbell, the local agent of the company at Hastings, for the purpose of having indorsements made thereon. Mr. Campbell being out of the city, the policy was left with one Winslow, a clerk of Mr. Campbell, to make the indorsements, who, on July 1, 1889, wrote upon the face of the policy the following: "Night watchman and watchman's clock discontinued; \$10,000 total concurrent insurance permitted. Loss payable, first, to the Nebraska Loan & Trust Company; second, to Wigton & Evans. L. M. Campbell." Counsel for plaintiff in error dispute the authority of Mr. Winslow to make the indorsements. The proofs show that he had, prior to this transaction, performed considerable work for Mr. Campbell in the insurance business; that he signed Mr. Campbell's name to the policy in suit; that a copy of the indorsement in question was forwarded to the company, and it recognized the same as being the act of its agent by the secretary of the company writing Mr. Campbell in reference thereto the following letter under date of July 17, 1889:

"*L. M. Campbell Esq., Hastings, Neb.*—DEAR SIR: We have *your* indorsement, dated July 1st, on policy No. 379, Gazette-Journal Company. We say to you very frankly that we do not propose to accept *your* indorsement, and if you will consult our prohibited list you will see that we do not write personal property mortgaged or incumbered. We must ask you to immediately cancel this policy.

Please do not stop to argue the question in this instance, but let us have the policy with as little delay as possible.

"Yours truly,

WM. TREMBOR,

"Secretary."

While the company declined to accept the indorsement, its refusal so to do was not because Winslow signed the name of L. M. Campbell thereto, but solely on the ground that the property covered by the policy was incumbered. If Mr. Winslow could bind the insurer by signing Mr. Campbell's name to the policy in suit, it ought to be bound by the indorsement in question, to the same extent as if it had been made by Mr. Campbell personally. It was, in effect, his act. It was within the scope of the authority conferred by Campbell, and after the indorsement was made, Mr. Campbell recognized the same, and never repudiated the act. (*Duluth Nat. Bank v. Fire Ins. Co.*, 4 Am. St. Rep., 747, 85 Tenn., 76; *Bodine v. Ins. Co.*, 51 N. Y., 117; *Eclectic Life Ins. Co. v. Fuhrenkrug*, 68 Ill., 463; May, Insurance, sec. 154; Wood, Insurance, sec. 409.)

It is urged that the indorsement was not binding until approved by the company, and that it, immediately after receiving notice thereof, rejected it and ordered the policy canceled. There is no provision of the policy which requires that such an indorsement should be made by any particular officer of the company, or that the policy must be sent to the home office of the company for such purpose. It only specifies that the policy shall be void when the property insured is alienated or incumbered, unless the consent of the company is indorsed on the policy. A local agent having the power to make a contract of insurance has authority to make indorsements upon a policy of insurance like the one in question, and when so made, the company will be bound thereby. If the policy was invalidated by the placing of the mortgages upon the property, why did the company order the agent to cancel the risk? By so doing, it recognized that the policy was still in force. While

the company declined to approve of the indorsement, the insured was not notified of such fact until after the fire. The indorsement was binding upon the company until the insured received notice of rejection. As no such notice was ever received by defendant in error before the loss, the incumbering of the property did not invalidate the contract.

The assignment of the policy was a sufficient approval of the transfer of the property by the Gazette-Journal Company to defendant in error. The assignment was made upon the back of the policy and was approved by Mr. Campbell, the local agent of the company. It is claimed that the secretary was the proper person to approve of the transfer, and that defendant in error had notice of that fact, inasmuch as in the blank form of approval printed on the policy, at the end of the line left for the signature of the person approving it, appears the abbreviation, "Sec'y." Doubtless the secretary of the company could have approved of the assignment in question, but we are unwilling to concede that he was the only person possessing such authority. On the blank assignment printed on the policy, appears these words: "Local agents will enter at once on the policy register all assignments *approved* by them, and report the same to the company." In addition to this it is expressly stipulated in the body of the policy that "no assignment of this policy shall be valid unless the assignment is indorsed hereon and approved by this company, or *its regular agent*, in writing," etc., thus making it clear that a regular agent of the company is empowered to approve of the transfer of the policy. The assignment in the case was made by the proper person and a report thereof was duly sent to the home office of the company. No objection or protest was made to the insured against the transfer, until after the loss in question, and it cannot now be heard to insist that the assignment was unauthorized.

Counsel for plaintiff in error insist that, inasmuch as Mr. Rounds took out other insurance on the property, the policy in suit was thereby invalidated. The indorsement made upon the policy, to which reference has already been made, was sufficient authority for the placing of the additional insurance. Written consent was given for \$10,000 concurrent insurance, and the total amount covered by policies in force did not exceed that sum; so that the increased insurance was not in violation of the terms of the contract, and did not avoid the policy.

The plaintiff in error insists that the contract is void because the night watchman and the watchman's clock were discontinued. There are several answers to this contention: First, consent for their being withdrawn was indorsed upon the policy; second, there is no evidence to show that they were in fact ever withdrawn; third, it does not appear that either a watchman or a watchman's clock was in the building at the time the insurance was written. The policy stipulates that the increase of the risk from any cause during the continuance of the insurance invalidates the policy, unless notice thereof is given to the company and consent to such increased hazard is indorsed on the policy. It requires no argument to show that if there was no watchman or clock kept in the building when the contract of insurance was entered into, the placing of them therein afterwards, and their subsequent withdrawal, would not be increasing the risk, within the meaning of the terms of the policy. To constitute a violation of the contract the hazard must have been greater than it was when the policy was issued.

It is finally urged that the company is not liable because the contract was canceled before the fire. We do not yield assent to the proposition that the risk was canceled, within the meaning of the policy. It is true the company wrote to Mr. Campbell, its local agent at Hastings, ordering the cancellation of the policy, and the latter, before the

fire, sent the policy to the company, but no notice was ever given Mr. Rounds of the intention of the company to cancel the risk, or that it desired so to do; nor was the unearned premium ever paid or tendered to the assured. The policy was never delivered to the agent for cancellation, but had been left in his hands for the purpose of having the indorsements above referred to entered thereon, and was never returned to the insured. The third stipulation in the policy reads as follows: "This company may cancel this policy at any time by returning the premium *pro rata* for the unexpired time, or by tendering it to the representative of the insured." The company had no power or authority to terminate the insurance without complying with the above provision by refunding or tendering back a ratable proportion of the premium for the unexpired term. Since this was not done, the policy remained in force and was binding upon the company. (May, Insurance, sec. 67; *Franklin Ins. Co. v. Massey*, 33 Pa. St., 221; *Ins. Co. v. Botto*, 47 Ill., 516; *White v. Ins. Co.*, 120 Mass., 330; *Lattan v. Royal Ins. Co.*, 45 N. J. L., 453; *Home Ins. Co. v. Curtis*, 32 Mich., 402; *Albany Ins. Co. v. Keating*, 46 Ill., 395; *Van Valkenburgh v. Lenox Ins. Co.*, 51 N. Y., 465; *Griffey v. Ins. Co.*, 100 Id., 417; *Farnum v. Phenix Ins. Co.*, 23 Pac. Rep. [Cal.], 872.)

There being no error in the record the judgment is affirmed with costs.

AFFIRMED.

THE other judges concur.

ANTHONY A. BICKEL ET AL., APPELLEES, V. WARREN
DUTCHER ET AL., APPELLEES, IMPLEADED WITH
THEODORE GALLIGHER ET AL., APPELLANTS.

[FILED NOVEMBER 23, 1892.]

1. **Bill of Exceptions: MOTION TO SUPPLY EXHIBITS.** This court will not, on the motion of an appellant, require the appellee to supply exhibits claimed by the former to have been introduced in evidence in the district court, when such exhibits have never been attached to or made a part of the bill of exceptions.
2. ———: ———. The appellant, on presenting his bill of exceptions for settlement and allowance, objected to certain exhibits attached thereto by the official stenographer on the ground that they were not true copies of the original, whereupon they were stricken out by order of the trial judge and the bill of exceptions allowed without them. *Held*, That this court will not entertain a motion by appellant to require appellee to supply such exhibits.
3. **Appeal: LIMITATIONS AS TO TIME.** The time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals, by filing in this court a certified transcript of the proceedings of the district court.
4. The case of *Horn v. Miller*, 20 Neb., 98, overruled.

MOTION by appellants to require appellees to supply certain exhibits used in the court below, which were not made a part of the bill of exceptions, and motion by appellees to dismiss appeal from the decree of the district court for Douglas county. *Motions overruled.*

David Van Etten, for appellants.

Howard B. Smith, and *G. W. Covell*, for appellees.

POST, J.

This is an appeal by the defendants Galligher and wife from a decree of the district court of Douglas county fore-

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closing certain mortgages and mechanics' liens, and for the sale of the property in controversy in satisfaction thereof. The questions submitted for consideration at this time are presented by the motion of appellants to require appellees to supply certain exhibits which they allege were introduced in evidence before the district court and which are not included in the bill of exceptions filed in this court, and the motion of appellees to dismiss the appeal for the reason that it was not taken within the time allowed therefor by law. It is alleged in appellants' motion that Exhibits C and D, the plans and specifications for the building which is the subject of the controversy, were introduced in evidence, "which exhibits have disappeared from said records and have never been attached to said bill of exceptions as such, notwithstanding appellants' written objections attached thereto, and appellants move the court that appellees be required severally to produce said exhibits to be attached to the bill of exceptions," etc. Numerous affidavits have been filed by the respective parties in support of and against the motion, from which it appears that when the bill of exceptions was prepared by the official stenographer at the request of appellants the two exhibits in question could not be found. The stenographer thereupon procured from one of the appellees the original plans and specifications, of which the exhibits in question were duplicates, and attached them to the bill of exceptions. Objection being made by Mr. Van Etten, attorney for appellants, to such copies, they were excluded by the trial judge, Hon. E. Wakeley, and the bill of exceptions allowed and signed without such exhibits having been attached thereto. The motion of appellants is without merit. The exhibits were a part of the evidence in the district court, and if the copies furnished by the court reporter were incorrect, appellants should have had them corrected in that court or before the trial judge. They appear to overlook the fact that it was their own bill of exceptions and that it was their duty to present

for allowance a true bill. If the missing papers had been introduced in evidence by appellees and remained in their possession, or under their control, we have no doubt the district court would have required them to be supplied upon motion of appellants. It is alleged by appellants that Exhibits C and D were introduced in evidence by them and left in the custody of the stenographer, but the part of the record to which we have been referred contains no reference to them except that they were identified by the witness Finley and marked by the stenographer. Nor are we able, after a careful examination of the voluminous record, to discover that they were ever offered in evidence. But in no event is it the province of this court to correct the bill of exceptions, and the motion of appellants should be denied.

2. The question presented by appellees' motion to dismiss the appeal is attended with more embarrassment, in view of the conclusion of the majority of the court in *Horn v. Miller*, 20 Neb., 98. Before making further reference to that case let us examine the facts disclosed by the record in this. The decree begins with the following recital: "Afterwards, at the May term of said court and on the 30th day of July, 1891, a decree was rendered herein as follows." At the end of the decree, and immediately above the clerk's certificate thereto, appears the following: "Dated July 27, 1891." The only other record evidence on the subject is an entry in the appearance docket indicating that the decree was entered on the 1st day of August, 1891. The clerk of the district court testifies that the decree was filed in his office July 30. From the affidavits of appellees it appears that on the 14th day of July, Judge Wakeley from the bench publicly announced his findings of fact and conclusions of law, or, in the language of the affidavits, "his findings and judgment," and that Mr. Smith, of counsel for appellees, was directed to draft a decree in accordance with the opinion so announced; that a decree was prepared

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and submitted to the attorney for appellants, by whom it was returned to Mr. Smith on the 22d day of July with written objections to the form thereof. Subsequently it was approved by the judge over the objections of appellants and filed with the clerk July 30. It does not appear that any notes were made by the district judge at the time of the announcement of his conclusion, or any entry in the trial docket or other record or entry of the decree, until it was approved by the judge presumably on the 27th. The question therefore is, When did the time allowed for appeal begin to run against appellants? If from the time of the delivery of the opinion of the judge on the 14th, the time had expired before the appeal was taken; but, if it is to be reckoned from the date of the approval, to the decree on the 27th, or from the date it was filed with the clerk on the 30th, it is clear that the appeal was taken in time and the motion to dismiss should be denied.

This case might be distinguished from *Horn v. Miller* on the facts, since here there is no record evidence whatever that the decree was entered on the 14th; hence the effect of the affidavits of appellees is to impeach or contradict their own judgment. We have, however, re-examined the question and the conclusion reached is in accordance with the views expressed in that case in the dissenting opinion of the present chief justice. We can agree with the learned author of the majority opinion, that for some, perhaps most, purposes the date of a judgment is the time when the decision was made and announced by the court, rather than the time when it was entered upon the records. But in most, we believe all, of the cases cited in the opinions and text-books in support of that proposition the judgment was subsequently entered in conformity with the decision, and that in none of them was the testimony of witnesses received by the appellate court to prove that the judgment or decree was wrong in fact and was entered at a time other than that shown by the record. According to the practice in the chancery

courts, the enrollment or entry of a decree was necessary before a bill of review would lie (Story's Eq. Pleading [9th ed.], sec. 403; Daniel's Ch., 1576, 1581), and following that practice the rule has prevailed both in courts of common law and of equity in this country where the distinction has been maintained, that there must be an entry of the judgment or decree before an appeal will lie. By this it is not meant that it must in all cases be actually spread upon the records of the court, for, as said in *Horn v. Miller*, in some states no such formal entry is required. But that the judgment must be made a matter of record in order to limit the time for appeal is a proposition well sustained by authority. (*Humphrey v. Havens*, 9 Minn., 318; *Hostetter v. Alexander*, 22 Id., 559; *Exley v. Berryhill*, 36 Id., 117; *Hazeltine v. Simpson*, 61 Wis., 427; *Milwaukee v. Pabst*, 64 Id., 244; *Rubber Co. v. Goodyear*, 6 Wall. [U. S.], 153)

It is said by Judge Elliott in his recent valuable work on Appellate Procedure, sec. 118: "The general rule is that there must be an entry of judgment before an appeal can be taken, and it must follow that until the judgment is entered the time within which an appeal must be taken does not begin to run. As an appeal taken before an entry of judgment is premature, it may be dismissed on motion. There is some conflict in the adjudged cases, but the decided weight of authority supports the rule we have stated. It seems clear upon principle that the rule stated must be the correct one, for until there is an entry of judgment there is no authentic record evidence of a final disposition of the case, and that there is a final judgment must, as a general rule, appear from the record." And again, sec. 119, the same author says: "The right to appeal, as a general rule, dates from the time that a complete judgment is rendered and recorded."

The rule which, in our opinion, has the sanction of authority, and which is commended by considerations of

Haynes v. Union Investment Co.

justice and equity, is that the time for appeal begins to run against the appellant from the time it is within his power to comply with the provisions of the statute regulating appeals by filing in the court a transcript of the proceedings of the district court, and not before. The motions to require appellees to supply the exhibits mentioned therein, and to dismiss the appeal are overruled.

MOTIONS OVERRULED.

THE other judges concur.

WILLIAM HAYNES V. UNION INVESTMENT COMPANY
ET AL.

[FILED DECEMBER 16, 1892.]

1. **Landlord and Tenant: LEASE: COVENANT OF LESSOR TO PAY FOR IMPROVEMENTS: FORFEITURE: EQUITABLE RELIEF.** A lease contained this provision: "Upon the expiration of this lease, and before the surrender of said premises by said parties of the second part, said party of the first part shall purchase and pay for all the furniture, pictures, and fixtures put into said premises by parties of the second part. If said parties cannot agree upon price of said furniture, then party of the first part shall select one man and the parties of the second part shall select one man, and the men chosen shall select a third, and said three men shall act as arbitrators and determine the price of said furniture, pictures, and fixtures, and said first party shall pay the price so determined and fixed. The family pictures and furniture belonging to the families of said parties of the second part are excepted according to inventory to be attached to this lease, and all the furniture and fixtures put into said premises by the said parties of the second part, except family pictures and furniture, shall be and are hereby pledged for the payment of rent, and said party of first part shall have a lien thereon for rent." *Held*, That the tenant could not be ejected without payment of the furniture, etc. That a court of equity will

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protect the tenant in possession of the property until he is paid for the value of such furniture and fixtures.

2. ———: FORFEITURE: NON-PAYMENT OF RENT: DEMAND. In order to work a forfeiture of a lease for non-payment of rent there must be a demand on the tenant for the rent, although such demand may be in the form of a notice to quit.
3. ———: CONTROVERSIES BETWEEN LESSOR AND LESSEE: EQUITABLE JURISDICTION TO PREVENT MULTIPLICITY OF SUITS. Where many questions are in dispute between a lessor and lessee beside the mere right of possession of the property, a court of equity will entertain jurisdiction and thus settle all matters between the parties relating to the subject in one action, and prevent a multiplicity of suits.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiff in error:

Demand for performance must be made before a forfeiture can be adjudged. (*Merrifield v. Cobleigh*, 4 Cush. [Mass.], 182; *Bowman v. Foote*, 1 Am. Law Reg., n. s. [Conn.], 360; *McQuesten v. Morgan*, 34 N. H., 400.) Payment of furniture, fixtures, and pictures by the landlord is, by terms of the lease, a condition precedent to recovery of possession of the premises. (*Hopkins v. Gilman*, 22 Wis., 476, and 47 Id., 581; *Ecke v. Fetzer*, 65 Id., 55.) The cases last named were also cited to the point that the cause is a proper one for the intervention of a court of equity to protect the tenant in his possession till payment is made for improvements, and all matters in controversy between lessor and lessee are determined.

W. A. Prince, and *Thompson Bros.*, contra.

MAXWELL, CH. J.

This is an action somewhat in the nature of a bill of peace. It is alleged, in substance, in the petition that William Haynes is the assignee of a lease made between

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C. W. Scarff and Eno & Moulton; that the Union Investment Company is the owner of the premises under a deed from C. W. Scarff, made after the execution and delivery of the lease; that John D. Moore is trustee for the purpose of collecting rents of the property in question, which is hotel property, known as the Palmer House, in the city of Grand Island; that the lease, by its terms, provided that possession of the premises would be given to the lessees June 1, A. D. 1887; the rent should be payable in monthly installments on the 15th of each month; a copy of the lease is attached to plaintiff's petition and made a part thereof. The building, at the time of the execution of the lease, was in course of erection, and was not completed and possession given under it until June 20, 1888. Haynes purchased Eno & Moulton's leasehold interest and certain personal property in the hotel on the 20th day of June, 1890, and took immediate possession, paying \$28,000 therefor.

The lease provides that the lessor or assigns should keep the premises in repair; and that on the expiration of the lease and before surrender of possession the lessor should purchase and pay for all furniture, fixtures, and pictures put in the premises by the lessee; and in the event of a dispute as to the value thereof the lease provided for the selection of arbitrators to determine such value. The exact words of this provision are as follows:

"Upon the expiration of this lease, and before the surrender of the possession of said premises by said parties of the second part, said party of the first part shall purchase and pay for all the furniture, pictures, and fixtures put into said premises by parties of the second part. If said parties cannot agree upon price of said furniture, then party of the first part shall select one man and the parties of the second part shall select one man, and the men chosen shall select a third, and said three men shall act as arbitrators, and determine the price of said furniture, pictures, and

fixtures, and said first party shall pay the price so determined and fixed. The family pictures and furniture belonging to the families of said parties of second part are excepted according to inventory to be attached to this lease, and all the furniture and fixtures put into said premises by the said parties of the second part, except family pictures and furniture, shall be and are hereby pledged for the payment of rent, and said party of the first part shall have a lien thereon for rent."

The value of this property is alleged in the petition at \$28,000. The petition alleges failure to repair, after repeated demands for making such repairs; that plaintiff had made repairs to the value of \$14.88; that other repairs were then needed; and that plaintiff was damaged by failure of lessors to make the same to the amount of \$500; that on or about July 20, 1890, he offered to pay rent for the month ending July 20, less the amount so paid for repairs, and was informed by Moore, trustee, that a Mr. Marsh, whose business it was to look after repairs, was absent from the city, and requested the plaintiff to wait until his return. On the 20th day of August he called again on Moore, tendered and offered to pay \$400 more, being rent due for the month ending August 20, 1890, when he was informed by the trustee that he had been instructed to receive no more rent from the plaintiff.

The petition further alleges that Marsh not having returned to the city, and that plaintiff being in doubt as to his legal rights in the premises, then tendered to said Moore \$800, being rent in full for the months ending July 20 and August 20, 1890, which was also refused. Notice to quit was served upon the plaintiff on the same day, signed by the defendants by their attorney.

The petition also alleges that no demand was made on the plaintiff for any rent at any time; that no offer was ever made to pay for the property in the hotel according to the terms of the lease, nor any offer to arbitrate as to the

price or value thereof, nor did they offer to make the necessary repairs upon the building, or to pay for those already made by the plaintiff; that suit was commenced in the county court of Hall county, on August 30, by defendants to recover possession of the premises, and was then pending. This suit was instituted in the district court of Hall county September 6, 1890, and \$800 deposited with the clerk of the court, and contains also an offer to pay \$400 to the clerk on the 20th day of each month thereafter for the use and benefit of the defendants during the pendency of the suit.

The petition also alleges a conspiracy on the part of the Union Investment Company and Moore to injure the plaintiff in his financial reputation and standing; that the suit was instituted for the sole purpose of harassing and annoying the plaintiff; and alleging that the plaintiff had no adequate remedy at law in the premises; that if the suit in the county court was allowed to proceed it would result in the prosecution of numerous suits to ascertain the value of the property in the hotel, to ascertain the amount of plaintiff's damage in the premises from defendants' failure to repair, and value of repairs already made, and praying a temporary order of injunction; and that in the event the plaintiff's right to the possession had been forfeited, that the value of the furniture, fixtures, and pictures might be ascertained by the court, and the defendants compelled to pay for the same before possession should be surrendered by the plaintiff; that his damages by reason of the failure to make the repairs might be ascertained and defendants compelled to pay the same; that he might also recover cost and value of all repairs made by him, and that on the final hearing the suit in the county court might be forever enjoined; and praying for general relief.

A general demurrer was sustained to the petition in the court below, and the plaintiff not desiring to amend, the action was dismissed.

In our view the petition states a cause of action. The general rule is that where a lessor is by contract liable to pay his tenant for improvements made on the leased premises during the tenancy, the tenant will be allowed to retain possession of the leased property until such payment be made, unless there be a special contract compelling the tenant to deliver possession without such payment. The tenant is treated as having an equitable lien upon the premises for his improvements and to retain possession in order to enforce his lien. (*Ecke v. Felzer*, 65 Wis., 55; *Hopkins v. Gilman*, 22 Id., 476, and 47 Id., 581.)

In *Hopkins v. Gilman*, *supra*, Gilman, although known to be a man of great wealth, was not permitted to recover possession of the premises until he had paid for the improvements which, on the termination of the lease, he had agreed to pay for. The same rule applies where the lessor agrees to purchase and pay for the furniture, fixtures, etc., of the lessee. This is a part of the contract which, in order to justify ejectment, must be fulfilled on the part of the lessor. In the last case cited from Wisconsin it was held that a court of equity will protect the lessee in possession of the property until he is paid for the value of the improvements. So in the case at bar, equity will protect the lessee in possession until the property which the defendant agreed to purchase is paid for.

It is alleged in the petition that no demand for rent has been made, and this is admitted, for the purpose of the action, by the demurrer. Such demand is necessary in order to predicate forfeiture on the failure to pay. Under the decisions of this court a demand may be made by a notice to quit. (*Hendrickson v. Beeson*, 21 Neb., 61.) If this is a sufficient demand it is probable that a tender of payment at that time would defeat a recovery.

It is claimed that a court of equity has no jurisdiction. In our view this position is untenable. Many other questions are in dispute beside the mere naked right to pos-

Work v. Jacobs.

session of the property, and these can only be adequately adjusted in a court of equity, and thus in one action settle all matters in controversy and prevent a multiplicity of suits. It is apparent that the court erred in sustaining the demurrer. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WORK BROS. & Co. v. OLIVER JACOBS & Co., ET AL.

[FILED DECEMBER 16, 1892.]

Sales: OBTAINING CREDIT BY MISSTATEMENT OF FINANCIAL CONDITION: FRAUD: RESCISSION. Where an insolvent purchaser of goods makes representations as to his financial condition which he knows do not represent the true condition of his affairs, by reason of which a seller is induced to part with his goods on credit on the faith of such statements, the transaction is fraudulent and the seller may, upon discovering the fraud, rescind the sale and reclaim the goods.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Lamb, Ricketts & Wilson, for plaintiffs in error.

Wooley & Gibson, and *E. P. Holmes*, contra.

MAXWELL, CH. J.

This is an action of replevin instituted by the plaintiffs against the defendants to recover "137 suits of ready made clothing and 126 pairs of pantaloons, ready made, and two coats and two vests, of the value of \$1,632.63,

35 772
47 233

35 772
54 793

being all the ready made clothing in the general stock of said Jacobs & Co., at Wabash, Nebraska. Plummer, Perry & Co. answer that they have a special interest in the property by virtue of a chattel mortgage. The answer of Jacobs & Co. is as follows:

“Come now the above named defendants, Oliver Jacobs, Paulina A. Horton, and Joseph Emery, partners doing business in the firm name of Oliver Jacobs & Co., and for separate answer to plaintiffs’ petition deny each and every allegation, averment, and statement therein contained.

“Second—These defendants further answering allege that on and prior to about the 20th day of August, 1889, these defendants were the owners, absolutely, of the goods and chattels described in plaintiffs’ petition; that on or about said date these defendants executed and delivered to the said Eli Plummer, Roscoe Perry, and John Fitzgerald, partners doing business as Plummer, Perry & Co., a chattel mortgage upon said described goods to secure *bona fide* indebtedness in the sum of \$2,500.

“Third—That under and by virtue of said chattel mortgage the said defendants Plummer, Perry & Co. took possession of said goods and chattels, and so held possession at the time said goods were taken by the writ of replevin by the plaintiffs.

“Fourth—That the said defendants Plummer, Perry & Co., under and by virtue of said chattel mortgage, were seized of a special ownership in said goods and chattels, and were entitled to the possession of the same.

“Fifth—That these defendants have no title or ownership in said chattel property, unless there should be a surplus over and above the amount necessary to pay the claim of said Plummer, Perry & Co.

“Sixth —Wherefore these defendants pray that they may go hence and recover their costs, and that the possession of said property be awarded the said Plummer, Perry & Co., mortgagees as aforesaid.”

Work v. Jacobs.

The parties entered into a stipulation as to the facts as follows:

"It is hereby stipulated and agreed that this cause shall be, and the same hereby is, submitted to the above entitled court for determination on the following agreed facts:

"First—That the plaintiffs are wholesale dealers at Chicago, Illinois.

"Second—That defendants Oliver Jacobs & Co., at all times herein mentioned and up to the 19th day of August, 1889, were dealing in general merchandise at Wabash, Nebraska, under the firm name of Oliver Jacobs & Co., which firm was composed of Oliver Jacobs, Paulina A. Horton, and Joseph Emery.

"Third—That at all times herein mentioned the defendants Plummer, Perry & Co. were and still are wholesale grocers at Lincoln, Nebraska.

"Fourth—That on the 11th day of March, 1889, the defendant Oliver Jacobs & Co., through Oliver Jacobs, for the purpose of obtaining credit from plaintiffs, and for the purpose of buying goods from them on credit, made to plaintiffs a statement of the resources and liabilities of said firm, and the individual members thereof, which statement was as follows:

**RESOURCES AND LIABILITIES OF THE FIRM OF OLIVER
JACOBS & CO.**

Resources.

| | |
|---|-------------|
| Three hundred acres of land adjoining the town of Wabash..... | \$13,500 00 |
| Four town lots | 400 00 |
| Live stock..... | 1,400 00 |
| Grain | 300 00 |
| Outstanding accounts | 4,000 00 |
| Insurance due on loss..... | 5,000 00 |
| | <hr/> |
| | \$24,600 00 |

Work v. Jacobs.

Liabilities.

| | | |
|---|------------|------------|
| Real estate mortgage on above 300 acres of land..... | \$5,000 00 | |
| Total other indebtedness | 4,000 00 | |
| | <hr/> | \$9,000 00 |

| | |
|-----------------|-------------|
| Net worth | \$15,600 00 |
|-----------------|-------------|

Individual property of Oliver Jacobs:

| | |
|------------------|------------|
| Real estate..... | \$1,500 00 |
|------------------|------------|

Individual property of Mrs. P. A. Horton:

| | |
|--|------------|
| 160 acres of land near Elm- wood..... | \$4,800 00 |
| Bills receivable..... | 3,000 00 |
| | <hr/> |
| | \$7,800 00 |

Liabilities:

| | |
|--|----------|
| Real estate mortgage on above farm | 2,300 00 |
|--|----------|

| | |
|-----------------|------------|
| Net worth | \$5,500 00 |
|-----------------|------------|

Individual property of Joseph Emery:

| | |
|-------------------------------------|------------|
| Real estate, Page county, Iowa..... | \$7,200 00 |
| Live stock | 2,100 00 |
| Grain..... | 300 00 |

Which statement was made to all creditors and including Plummer, Perry & Co.

“Fourth—That at the time of making the above statement the said firm of Oliver Jacobs & Co. in truth and in fact owned no part of said 300 acres of land mentioned in the above statement, save by the contract attached hereto, marked Exhibit B, no part of the consideration therein mentioned having been paid, but they had given their notes for the same, which notes Horton now holds; that there was due on loss covered by insurance only \$4,250, instead of \$5,000, and that said firm was indebted on unsecured claims \$9,132.10, instead of \$4,000; that the individual property of Oliver Jacobs was at that time mortgaged in the sum of \$200 instead of unincumbered; that at that time the 160 acres owned by Mrs. P. A. Horton,

near Elmwood, listed above, was incumbered \$2,475 instead of \$2,300, as stated in said statement.

“Fifth—That Oliver Jacobs knew all the facts when he made said above mentioned statement.

“Sixth—That plaintiff, relying on the truth and correctness of said statement so made to them by said Jacobs & Co., and believing the same to be correct and true, sold and shipped to said Jacobs & Co. the goods herein in controversy, in the month of March, 1889.

“Seventh—That said Jacobs & Co. have never paid for the goods in controversy or any part thereof.

“Eighth—That on the 19th day of August, 1889, and while said Oliver Jacobs & Co. were in the possession of a stock of goods at Wabash, Nebraska, including the goods in controversy, they executed and delivered in due form of law to one George Smith and Joe McKeag a chattel mortgage for the sum of \$300 and \$200 to secure a *bona fide* and unpaid debt, then and theretofore owing by said Jacobs & Co. to said Smith & McKeag; also a chattel mortgage for \$1,500 to defendants Plummer, Perry & Co., to secure a *bona fide* and unpaid debt owing to them from said Jacobs & Co., for goods and merchandise theretofore sold and delivered by Plummer, Perry & Co. to said Oliver Jacobs & Co., and said Jacobs & Co. turned possession of said stock of goods, including those in controversy, over to said Smith & McKeag, who held possession of the same until the 21st day of August, 1889, when said Smith & McKeag sold, assigned, and transferred the said mortgages, and all their rights thereunder, to said Plummer, Perry & Co., for a valuable consideration, by the execution and delivery to them of Exhibits A and B, hereto attached and made a part of this stipulation, and turned his possession over to them, and then said Plummer, Perry & Co. continued in possession from that time until the levy of the writ in this case; and that on the 20th day of August, 1889, said Jacobs & Co. executed to said

Plummer, Perry & Co. a chattel mortgage, in due form of law, for \$2,000 to secure the debt of that amount for goods theretofore sold and delivered to Jacobs & Co. by said Plummer, Perry & Co.

"Ninth—That at the time of the levy of the writ in this case the defendants Plummer, Perry & Co. were in possession of all the said stocks of goods, including the goods in controversy, under and by virtue of the three chattel mortgages heretofore herein mentioned, and with no other right thereto than by said mortgage conferred.

"Tenth—That said indebtedness of said Jacobs & Co. to Plummer, Perry & Co. and George Smith and Joe McKeag was *bona fide*, and was for goods theretofore sold and delivered to said Jacobs & Co. by said Plummer, Perry & Co., and Smith & McKeag was wholly unpaid.

"Eleventh—That said goods so taken under this writ in this case are now in the possession of the plaintiff and have been since levy and writ of replevin.

"Twelfth—That the value of goods in controversy in this case at the time they were taken, was \$1,000.

"Thirteenth—That five cents is the amount of damages sustained by the defendants Plummer, Perry & Co. for the detention of these goods.

"Fourteenth—That plaintiffs did not know the facts above mentioned as to resources and liabilities of said Oliver Jacobs & Co. until the day before this suit was brought.

"Fifteenth—That said Plummer, Perry & Co. sold the remainder of said stock after the replevin of the goods in controversy for the sum of \$1,953.22 and applied in the payment of the mortgages so held by them, and there is still due thereon \$2,128.58.

"Sixteenth—That said firm of Oliver Jacobs & Co. and Oliver Jacobs, Paulina A. Horton, and Joseph Emery are, and since August 19, 1889, have been, insolvent.

"Seventeenth—That the interest of Plummer, Perry &

Co. in the goods in controversy, if any, is the amount of the unpaid balance of their claim, which is \$2,128.58, as shown by the statement hereto attached and made a part of this stipulation, and marked Exhibit C."

The court below found in favor of the defendants and rendered judgment accordingly.

It will be observed that it is agreed that Jacobs & Co. were insolvent when the goods in question were purchased from the plaintiffs, and that Jacobs & Co., when purchasing the same, led the plaintiffs to believe that they were solvent and able to pay their debts, and it is clearly shown that Plummer, Perry & Co. gave no new consideration when taking the chattel mortgage. This being so, the right of the plaintiffs, the owners of the goods, is superior to theirs. This question is considered by the supreme court of Iowa in *Reid v. Cowduroy*, 44 N. W. Rep., 351, in a case very similar to this, and it was held that the seller could reclaim the goods. It is said "where goods are sold there is a promise, expressed or implied, on the part of the buyer to pay for them, and the seller has a right to rely upon the presumption that the buyer intends to perform his obligations by making payment. Therefore, if the latter entertains a secret intent not to make payment, that intent and his failure to disclose it constitute such a fraud as will entitle the seller to rescind the sale. (*Factory v. Lendrum*, 57 Ia., 581; s. c., 10 N. W. Rep., 900; *Lindauer v. Hay*, 61 Ia., 665; s. c., 17 N. W. Rep., 98; *Nichols v. Michael*, 23 N. Y., 266; *Hennequin v. Naylor*, 24 N. Y., 140; *Dow v. Sanborn*, 3 Allen [Mass.], 182; *Belding v. Frankland*, 8 Lea [Tenn.], 67; see, also, *Lee v. Simmons*, 65 Wis., 526; s. c., 27 N. W. Rep., 174; *Donaldson v. Farwell*, 93 U. S., 631.) The supposed solvency of the purchaser is usually a material inducement to the sale of goods; and where it is, and the purchaser makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies in effecting the sale, it may be rescinded by

Reeves v. Wilcox.

the vendor as fraudulent." This, we think, is a correct statement of the law, and was so held by this court in *Symms v. Benner*, 31 Neb., 593; *Tootle v. First National Bank*, 34 Id., 863, and is the general rule. (*Redpath v. Brown*, 39 N. W. Rep. [Mich., 1888], 51; *McGraw v. Henry*, 47 Id. [Mich., 1890], 345; *Edson v. Hudson*, Id. [Mich., 1890], 347; *Reid v. Cowduroy*, 44 Id. [Ia., 1890], 352; *People's Savings Bank v. Bates*, 120 U. S. [1887], 556; *Morse v. Godfrey*, 3 Story [C. C. U. S.], 364; *Johnson v. Peck*, 1 Wood. & Min. [C. C. U. S.], 334; *Rison v. Knapp*, 1 Dill. [C. C. U. S.], 187.) It follows that the judgment must be reversed and the cause will be remanded to the district court to render judgment in accordance with this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LIZZIE REEVES, EXECUTRIX, APPELLANT, V. EDWARD
M. WILCOX ET AL., IMPLEADED WITH H. W. CUR-
TIS ET AL., APPELLEES.

| | |
|-----|-----|
| 35 | 779 |
| 139 | 188 |
| 35 | 779 |
| 46 | 280 |

[FILED DECEMBER 16, 1892.]

Mortgage Foreclosures: PURCHASE MONEY: MORTGAGE EXECUTED BY ONE OF THREE PURCHASERS: DEFICIENCY JUDGMENT. Three persons jointly purchased three lots in an addition to the city of Lincoln for \$3,000, one-fourth cash in hand and the balance on credit. By agreement the title was taken in the name of W., one of the purchasers, and he was to give his note secured by mortgage on the lots for the unpaid purchase money, and these were accepted by the vendor. *Held*, There being no trust relations involved, and neither fraud, accident, or mistake that the vendor was restricted to the security thus taken and could not recover a deficiency judgment against the purchasers who did not sign the note.

Reeves v. Wilcox.

APPEAL from the district court for Lancaster county.
Tried below before FIELD, J.

Thomas Ryan, for appellant.

Davis & Hibner, and *C. Thompson*, contra.

MAXWELL, CH. J.

This is an action to foreclose a mortgage and to recover a deficiency judgment against the defendants Curtis and McCargar. The testimony tends to show that Frank D. Reeves in his lifetime, jointly with one Fred A. Hovey, owned lots 17, 18, and 19, in Woolworth's addition to Lincoln, and defendant Wilcox was their agent for the sale of said lots; that Wilcox, while acting as such agent, went to appellees Curtis and McCargar and represented that he could make some money on the lots in question if he could raise the cash payment, \$750. The property was exhibited and price stated, after which the parties went to the office of Reeves and there concluded a bargain by which Wilcox took a deed from Reeves (who held the legal title) to himself, not as trustee, but in his individual capacity. The appellees each agreed to contribute and did contribute one-third, or \$250, of the cash payment, and Wilcox, by and with the consent of all the parties to the transaction and as one of the conditions on which the sale was concluded, having taken the deed for that purpose, gave his note for the balance, \$2,250, secured by a first mortgage on the premises purchased. There was an understanding between Wilcox, McCargar, and Curtis, to the effect that the property should be marketed and each receive one-third of the profits a memorandum of which was at some time made in writing, but to which neither Reeves nor Hovey were parties in any way. No sale was made and no profits accrued, and the notes given by Wilcox were not paid. Foreclosure proceedings were commenced against Wilcox, Curtis, and

McCargar. McCargar, appellee herein, defendant therein, filed a separate demurrer to the petition, which was overruled, and he then answered denying the alleged oral contract, disclaiming any interest in the property, and denying liability on the notes. Wilcox was defaulted and the property went to sale, bringing about \$800. The court gave judgment against Wilcox for the deficiency, and discharged appellees McCargar and Curtis, from which judgment this appeal was taken.

The deposition of Frank Reeves was taken, as he was in poor health. In his direct examination he testifies: "On the 9th of March, A. D. 1887, or about that time, H. W. Curtis, E. M. Wilcox, and C. A. McCargar came to my office in Lincoln together and purchased lots Nos. 17, 18, and 19 of Woolworth's subdivision in Lincoln, Nebraska, for \$3,000; all three participated in the negotiation, said they were buying them jointly, each to own an undivided one-third part; the cash payment was \$750 and each of the defendants mentioned paid \$250, his portion. When the deed came to be drawn, they asked if I had as soon make the deed direct to Wilcox and take mortgage and notes from Wilcox and wife for the balance of the purchase money. They said they would rather have it that way and have a writing between themselves showing the interest of each. . They gave some reasons for wanting it fixed that way, which I do not now recall, and whatever those reasons were, I consented to that arrangement, and the deed and notes and mortgage were so drawn." He also says that there was an agreement between the defendants as to the disposition of the property and distribution of the proceeds. This, however, could only affect the defendants themselves, and, so far as the evidence discloses, could not inure to the benefit of the plaintiff. The plaintiff made the conveyance and agreed to accept the note of Wilcox secured by a mortgage on the lots in question. This, then, was the measure of his security. None of the

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parties expected that the property would depreciate in value, hence there seemed no necessity for obtaining the notes of the defendants Curtis and McCargar. The plaintiff, therefore, cannot hold these parties liable.

The case of *Reynolds v. Dietz*, 34 Neb., 265, does not contravene the principle here established. In that case ten persons had purchased a tract of land for \$20,000, and as a part of the consideration, had assumed a mortgage on the property, the title being taken in the name of a trustee, and it was held that each was liable for his proportionate share of the mortgage debt. The liability in that case results from the nature of the contract.

In this case there was no trust in its proper sense. In any event there was an express contract as to the security for the unpaid purchase money, and there being neither fraud, accident, nor mistake in the transaction, the plaintiff's remedy is restricted to such security. The judgment is right and is

AFFIRMED.

THE other judges concur.

GRAHAM & SNYDER V. E. J. CARPENTER.

[FILED DECEMBER 16, 1892.]

Replevin: EVIDENCE. Upon the conceded facts and the evidence the judgment is right and is affirmed.

ERROR to the district court for Dawes county. Tried below before KINKAID, J.

H. M. Uttley, for plaintiffs in error.

Alfred Bartow, contra.

MAXWELL, CH. J.

March 16, 1887, one Andrew McGinley, as assignee, brought suit in the county court of Sioux county against The O 4 Cattle Company, Dr. E. B. Graham, manager, to recover \$50 for labor and services performed for the O 4 Cattle Company by one Irving Wilson, the claim or account for which had been purchased by said McGinley from said Irving. The transcript of the county judge shows the following facts:

"The plaintiff and defendant, represented by Dr. E. B. Graham, manager of said O 4 Cattle Company, appeared personally, and the defendant waived process and entered his appearance in the cause, and with the consent of the plaintiff confesses that he is indebted to him upon said account in the sum of \$50 principal and \$1.70 interest, and asks that judgment be rendered against the O 4 Cattle Company therefor. It is therefore considered by me that the said plaintiff recover from the said defendant the debt as aforesaid confessed, and also his costs. Ex. issued 31 March, 1887; Ap. 18, 1887, returned and judgment satisfied.

C. E. VERITY,

"County Judge."

February 18, 1888, an action in replevin was commenced by Graham & Snyder, plaintiffs in error, against the defendant in error, E. J. Carpenter, before W. G. Pardoe, J. P., of Dawes county, to recover two cream colored horses, each branded "O 4" on left shoulder. Mr. E. J. Carpenter purchased the horses sought to be recovered in said action, from one W. T. Livermore, in July, 1887. The justice seems to have found in favor of the defendant. An appeal was taken to the district court, where a jury was waived and the cause tried to the court, which rendered judgment in favor of the defendant in error.

The attorney for the plaintiffs in error has simplified the case somewhat by the statements in his brief. It is

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said: "For the purpose of this argument at this point let us admit that there was such a corporation as the O 4 Cattle Company, and that a man by the name of E. B. Graham was manager of the same, and I ask then according to the answer of the witness on page 12 in answer to this question by the court:

"Do you mean that was Graham—that is, one of this firm of E. B. Graham & Snyder?

"Yes; at that time it was Graham, Millard & Snyder."

"This answer of the witness clearly shows that it was not the same Graham that he referred to as the Graham, one of the plaintiffs in this action; and when we turn back to page 9 and the answer by this same witness, we find this fact made more plain; so we have absolutely no connection in fact by any competent evidence between the Graham whom the witness says purchased the property at the execution sale and the member of the firm of Graham & Snyder, plaintiffs; and when we take the evidence of Mr. Snyder, who positively declares that the partnership of which he was a member never did business under any name but Graham & Snyder (and the court will see by the copy of the articles of partnership in the record that such was to be the name), which partnership, so far as this record discloses, is still in existence, while the partnership or corporation of which the E. B. Graham referred to in the record by the witness McGinley, being Graham, Millard & Snyder, went out of existence in the summer of 1886, yet the judgment in the action upon which they pretended to sell this property was not recovered until 1887.

"Under this state of the record we find this to be the status of the case: One E. B. Graham, Millard & Snyder formed what was known and what we admit was the O 4 Cattle Company, a corporation; that this corporation was in debt and suit was commenced against them; that E. B. Graham (whether he had authority or not) waived service and confessed judgment, execution was issued, and the

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property of my clients (because they happened to have a member whose name was similar to the other) was taken and sold without their knowledge (I say sold because the witness McGinley says they were sold) to Graham, by Graham to Clough, Clough to Livermore, and Livermore to defendant, and by the judgment of the court this is legal and right. It cannot be."

Taking these statements together and the only question in dispute is the identity of Graham. As to him the proof shows beyond a doubt that the Graham who confessed judgment was the same Graham who was a member of the firm, and that the firm was indebted for labor to the plaintiff in that action, he being the assignee of Wilson. It is unnecessary to review the evidence at length. It is evident that the judgment conforms to the proof, and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

**LEVERETT M. ANDERSON, APPELLANT, V. SOUTH
OMAHA LAND COMPANY ET AL., APPELLEES.**

[FILED DECEMBER 16, 1892.]

Trusts: SUFFICIENCY OF EVIDENCE TO ESTABLISH. Evidence held to be insufficient to establish a trust in favor of the plaintiff in the property in controversy.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

*B. F. Kauffman, Seevers & Seevers, A. S. Churchill, and
Edson Rich, for appellant.*

J. M. Woolworth, Gannon, Donovan & Shea, and Lee S. Estelle, contra.

NORVAL, J.

This suit was instituted in the court below on the 10th day of November, 1888, by Leverett M. Anderson against the South Omaha Land Company, a corporation organized and existing under the laws of this state, and William A. Paxton, Peter E. Iler, James M. Woolworth, Alexander H. Swan, Thomas Swobe, Frank Murphy, and Charles W. Hamilton, alleging in his petition, in substance, that in or about the month of September, 1883, certain lands, described in the petition, situate in the counties of Douglas and Sarpy, were conveyed to the plaintiff and held by him in trust for certain parties who had contributed to the purchase price thereof, which amounted to the sum of \$350,000, including certain improvements made upon said lands, and at the time contemplated; that plaintiff contributed \$6,250 of said sum of \$350,000, and by reason thereof was the owner of one fifty-sixth portion of all of said property; that all the persons named as individual defendants, together with a large number of other parties, contributed to said sum of \$350,000 and were interested in said property, but that the exact amount so contributed by them is unknown to the plaintiff; that all the defendants knew that plaintiff was one of the contributors to said sum and owner of a portion of the property; that on or about the 1st day of January, 1884, at the request of the beneficiaries in said property, plaintiff and his wife, Ella S. Anderson, conveyed to the individual defendants, as trustees for the use and benefit of all the parties beneficially interested, all of said real estate, together with all structures, erections, improvements, ways, and rights of way, tracks, bridges, viaducts, culverts, fences, warehouses, shops, dwelling houses, superstructures, and fixtures upon said lands, as well those which should

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thereafter be acquired as those which have been acquired for the use of said trust estate, or in connection therewith, or which may be incident to said trust; that by the terms of said trust deed it was provided for the issue of three series of bonds in said deed described and secured thereby, and by said instrument said trustees were given certain and definite powers with respect to said trust property, as well as certain powers relative to the issuing of the several series of bonds in said deed of trust mentioned, which are set forth in a copy of the deed made in that behalf, annexed to and made a part of the petition; that by the terms of said deed, the said trustees were to issue of the first series of bonds five hundred of the face value of \$1,000 each, a second series of four hundred and fifty bonds of \$1,000 each, and a third series of a like number and denomination as the second series; that the defendants named in said conveyance as trustees accepted the trust and undertook the execution thereof, and that by virtue of the premises plaintiff was entitled to one fifty-sixth of the bonds to be issued under the provisions of said trust deed; that only the first series of bonds were ever issued, and for the second and third series certificates were issued in lieu of said bonds, stating that the holder of said certificates was entitled to the bonds, of the second series as shown by said certificates.

It is further alleged that by the terms of said trust deed certain of the lands therein described were to be sold to the Union Stock Yards Company of Omaha; that said trustees have sold and conveyed a portion of said lands to said Stock Yards Company, and received in payment thereof the sum of \$78,250; that said trust deed provided for the laying out and platting into lots and blocks certain other of said lands, and for the manner and method of making sales of such lots; that by the terms of said trust deed the said trustees were required from time to time to take, and preserve in writing, evidence as to the value of the trust

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estate, and to appraise the value thereof, and were prohibited from making sale at a less price than was so ascertained.

It is further alleged that on or about the 23d day of July, 1886, the said trustees, in violation of their said trust, made a pretended sale of all of said trust property, funds, and assets to one John H. Bosler, for the pretended sum of \$750,000, and said trustees ultimately conveyed to him all of said property; that certain of the trustees and other parties were interested with Bosler in said purchase, who afterwards, together with certain of said trustees, organized the South Omaha Land Company for the purpose of receiving the conveyance of said real estate and trust property, and holding the same for the use and benefit of the parties so claiming to purchase said trust property; that Bosler conveyed all of said property to said corporation, and it received such conveyance with full knowledge of all the facts stated in the petition; that the trustees concealed from plaintiff the fact that they were interested in the purchase of the property; that plaintiff has never received any part of said trust property, or any portion of the first issue of bonds, or any benefit arising therefrom, nor any certificate showing him to be entitled to his due and legal portion of the second and third series of bonds, when the same should be issued; that all of said trustees knew that plaintiff had furnished the money, as above stated, to purchase said lands, and create said trust property and funds, and also of his interests in and right to his proportion of said bonds and certificates aforesaid and that he had never received the bonds and certificates representing his interests; that of the said fund of \$350,000 there were \$22,951.72 turned over to the trustees mentioned in said trust deed and formed a part of the trust estate.

It is further alleged that said trustees sold said property for a grossly inadequate price and far below the appraised

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value thereof; that, in order to procure all of the said trustees to sign the conveyance to said Bosler, there were paid to certain of said trustees large sums of money, in addition to the distributive shares of such trustees, who were also personally interested in said property, as a bonus to secure the relinquishment of their own personal interest therein and to induce them to sign said conveyance; that the money thus paid as a bonus was taken out of the trust property; that such of the trustees as were not paid a bonus were interested with Bosler in said purchase, assisted in the organization of the defendant corporation, and are officers in said company.

The petition further charges that a large portion of said trust funds has been misappropriated by said trustees, and devoted to the payment of attorney fees in certain litigation brought about by the refusal of certain of the trustees to sign the deed of conveyance to said Bosler, and in payment of moneys to said certain trustees to induce them to sign such deed, and in other illegal and unwarranted expenditures; that since said pretended sale to Bosler, and the conveyance by him to the defendant company, large sales of said lands have been made, and there is now a large amount of money, notes, contracts, bills receivable, and other assets in the hands of said company; that a large portion of said lands has not been sold, in all of which funds, assets, property, money, and lands plaintiff is interested; that said funds, bills receivable, assets, and unsold property are of the value of \$5,000,000; that said trustees have wholly renounced and repudiated said trust relation to said property, and refuse to further act under said deed of trust, but insist that the sale is valid, and that the defendant corporation claims to be the owner of all of said trust property.

The prayer is, that the sale and conveyance of said property to Bosler, and by him to the South Omaha Land Company, be set aside, as fraudulent and void; that plaintiff's

interest in the trust property be ascertained, declared, and established; that the trustees be required to account for all moneys, property, bills receivable, and assets which have come to their hands, and the said company be likewise required to account; that plaintiff be decreed his full right and interest therein; that a receiver be appointed, and for such other or further relief as plaintiff is in equity entitled.

The defendants Swan, Swobe, Murphy, and Hamilton did not answer. The other defendants filed a joint answer, which is too lengthy to give the substance thereof here. For the purpose of our investigation it is sufficient to say that the answering defendants deny that plaintiff was one of the contributors to the purchase price of the lands in controversy, or ever had any interest in the property, and also many other allegations of the petition are denied. The defendants set up some new matters of defense which are controverted by plaintiff in his reply.

Upon the trial the district court found the issues in favor of the defendants, and dismissed the bill. Plaintiff appeals.

It is disclosed by the record that plaintiff has been a resident of Omaha since 1866, a portion of which time he was a conductor on the Union Pacific railroad; that the defendant Swan has been for many years a resident of Wyoming and engaged in the cattle business; that Anderson and Swan have been for years intimately acquainted, besides being distantly related by marriage; that in the latter part of 1882 Swan was in Omaha, and had some talk with Anderson on the subject of buying lands and building stock yards where South Omaha now stands, but no definite plan for the proposed enterprise was then formulated. In January following Swan went to Europe, and while on his way east, wrote and sent to Anderson the following letter:

“NEW YORK CENTRAL, Jan. 15, 1883.

“*L. M. Anderson, Omaha:* I had a long talk with Kimball, and very satisfactory. He gave me full history

of all troubles and differences. I am not at liberty to give details now, as he requested strict confidence; but I may say this to you, that he will favor me in any and every way possible in the carrying out of a scheme on the Omaha side with yards, slaughter houses, canning houses, and all other things that may follow—making the enterprise a big and successful scheme. He's all right; and if he holds his power in the road, I am solid for knocking down the whole outfit. I explained to him my plans, and he told me to make every endeavor to carry them out and he would see me through. You will understand the enterprise has attractions for him. Don't say anything more to Schaller, only to say that you can't tell anything about it until I get back. That ground and yards will not do; but you may take them down and use elsewhere. The ground at the Summit, about a mile beyond, where the drainage goes the other way from town, is now our idea. He will run the dummy right out regular trips, whenever the business is opened. The idea is to buy from one to two hundred acres at the Summit, and start yards, canning house, and all at once. He, Kimball, knew how I was pushed out of the other side, and he knows that J. T. was with Paxton. That was not entirely new to me; for I had a hint of it before. This is a brief outline of what will come if nothing happens to interfere. I will take in one or two moneyed parties, perhaps Scotch, have not yet determined who; but I will not again lose control and get Kimball out. This must be treated entirely confidential, as any leakage of plans would defeat all. No more will be made until I return. We sail 17th on 'Pavonia, Cunard Line.' My address, 23 Mayfield Garden, care James Wilson.

"A. H. SWAN."

In the month of April, 1883, Mr. Swan returned from his European trip, and soon thereafter he determined to go ahead with the stock yards scheme already alluded to, and to that end he made arrangements with Anderson, by which

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the latter was to contract for the lands in controversy. One C. R. Schaller was likewise employed to negotiate for the lands. In pursuance of said arrangement, Schaller, during the months of May, June, July, and August, 1883, purchased under contracts over 1,800 acres of land, at a cost of \$327,048.43, taking the contracts therefor in his own name. A portion of the purchase price was paid down, while on the remainder time was given. On the 6th day of June, 1883, after two purchases had been made, Schaller and Anderson entered into a writing, stating that the purchases, payments, and contracts were made by Schaller for Anderson, and the former, by said instrument, also assigned all interest in said contracts to the latter. The contracts taken by Schaller subsequent to the date last above were duly assigned to Anderson on the 12th day of January, 1884. Prior to the 30th day of August, 1883, there had been paid upon the lands something less than \$40,000. The testimony shows that prior to said date Mr. Swan solicited certain capitalists of Omaha to assist in the enterprise. Finally a meeting of the persons thus solicited was held on said date at the Millard Hotel, which resulted in the formation of the South Omaha Land Syndicate, of which Swan was made president and financial agent. A secretary and a treasurer were chosen. The syndicate raised, including the amount which had previously been paid on the contracts, the sum of \$350,000. The balance of the purchase money due upon the lands was paid, which left in the treasury \$22,951.57. Upon full payment being made on the contracts of purchase, the lands were conveyed by the owners to Anderson, who held the title in trust for the use and benefit of all the parties beneficially interested therein. Subsequently, at the request of the syndicate, Anderson and wife, by deed of trust, conveyed the property to Alexander H. Swan, Frank Murphy, Thomas Swobe, Charles W. Hamilton, William A. Paxton, Peter E. Iler, and James M. Woolworth, as trustees, they having been chosen by the

syndicate for that purpose. The terms of the trust upon which they took the title are set forth at great length in said instrument. The deed of trust recites, in substance, that said trustees have made their fourteen hundred several coupon bonds of \$1,000 each of even date with said instrument, payable to the order of L. M. Anderson, the bonds being divided into three series as follows: 500 of the first series and the second and third series to the number of 450 each. The form of the bonds and coupons of each series is set out in said instrument. Then the said deed of trust declares in brief, among other things, that the said trustees shall sell and convey a certain portion of the premises therein mentioned to the Union Stock Yards Company, of Omaha, at and for such sum of money as may be agreed upon by and between them and the said company, subject to certain conditions as to improvements to be made upon said real estate by said Stock Yards Company; that the trustees shall lay out the remainder of the lands conveyed to them, or so much and such parts thereof as they in their discretion may deem expedient, into a town, with streets, passage ways, and public grounds, and improve the same; that the lands shall be carefully valued and appraised by said trustees, and they were authorized to sell any parcel or parcels of said lands at not less than the appraised value thereof; that all moneys arising from such sales, after deducting the expenses of executing the trust, be held by said trustees for the security of the said bonds and coupons, and all such moneys be applied, first, to the payment of the bonds and coupons of the first series, and then to the payment of those of the second and third series, in the order named; that in case of any default in the payment of any interest or principal of any of said bonds for the period of six months, the holders of said bond so due and unpaid were empowered to enforce their rights by legal proceedings.

It is further provided in article eleventh of said trust deed that "If, after the payment of all the bonds secured

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by this indenture, or any of the said trust estates, rights, interests, or property of whatever nature hereinbefore mentioned, or arising out of the same, or the proceeds thereof, shall remain in the hands of said trustees undisposed of, and subject to be disposed of by them for the holders of the bonds of the third series, the said bondholders shall be, and shall be taken to be, entitled to the whole beneficiary right and interest therein, and in respect thereof; and the said trustees shall hold the said estate, rights, interests, and property for and in trust for them, and shall dispose of the same, either by distribution, division, or partition, among the said bondholders, or by sale and a distribution among the said bondholders of the proceeds arising therefrom according to their respective interests; and in such case of the final determination and settlement of their said trust, the said trustees shall respect the directions in writing of a majority of said bondholders, except as to the proportions of the interests of the several bondholders in the residue of the said trust estate."

It further appears from the evidence that bonds of the first series were issued by the trustees in accordance with the stipulations contained in said deed of trust; while the second and third series of bonds provided for in said instrument were never issued, but in lieu thereof certificates were given, certifying that the holder of the same was entitled to the number of bonds of the said second and third series stated therein, when the same should be issued. Subsequently all the bonds of the first series and the said certificates calling for bonds of the other series were distributed among the members of the South Omaha Land Syndicate, according to their respective subscriptions to the enterprise. At a meeting of the said trustees held on the 7th day of May, 1886, Mr. Swan, as president and financial agent of the syndicate, was directed to sell all the lands, bills receivable, cash, and assets belonging to the same for \$750,000, provided he effected such sale by the

1st day of August following. At a meeting of the trustees on July 24, 1886, Mr. Swan reported that he had entered into a contract for the sale of all of the trust estates to John H. Bosler for \$750,000; the sale was ratified and confirmed by a majority of the trustees, although three of them, Swobe, Murphy, and Hamilton, disapproved of the sale and refused to join with their associates in executing a deed of conveyance to Bosler. Thereupon Bosler brought suit in the circuit court of the United States for the district of Nebraska against all the trustees for the specific execution of the contract of sale, and Herman Kountz was appointed receiver by said court, to take charge of the trust properties. On the first day of January, 1887, said court rendered a decree in favor of the plaintiff in said action, and ordered the trustees to execute a conveyance to said Bosler, and on the 31st day of the same month the trustees executed their deed conveying to him the lands in controversy, as well as all the rights, debts, choses in action, moneys and interest of every kind and nature connected with and incident to the lands described in said trust deed. On the 3d day of January, 1887, the South Omaha Land Company was incorporated by John A. McShane, W. A. Paxton, J. H. Bosler, P. E. Iler, and J. A. Creighton, and by the articles of incorporation certain of the said trustees of the South Omaha Land Syndicate, with others, were appointed directors of the Land Company. On the 19th day of February, 1887, all the properties covered by the deed to Bosler were conveyed by him to the South Omaha Land Company.

It is an admitted fact that during the pendency of the suit already mentioned, and prior to the final determination thereof, a bonus amounting to several thousand dollars above their proportion or share of the \$750,000 was paid by Bosler to the three trustees who resisted the sale made to him by Swan, and thereafter such trustees made no further resistance to the carrying out of said sale, or to the said suit

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in the federal court. There is likewise to be found in the record some testimony tending to prove that certain of the remaining trustees were interested with Bosler as purchasers of the trust properties.

Counsel for appellant contend that Anderson contributed and paid out of his own moneys toward the original purchase of the real estate involved in this lawsuit, prior to the formation of the South Omaha Land Syndicate, \$10,576.15, for which he has never been reimbursed, and that by reason thereof he is entitled to one fifty-sixth interest in all of said lands. Appellees, on the other hand, insist that Anderson never invested a dollar of his own funds in the enterprise. The most important, as well as the most difficult question presented by the record for our consideration is purely one of fact, namely: Did appellant ever advance the sum claimed by him, or any other amount, towards the purchase of these lands? If he did not, then it is clear his suit must fail, for he bases his right to have a trust declared in his favor upon the ground that he was one of the contributors to the purchase price.

There is no dispute but that nearly \$40,000 had been paid on the contracts of purchase prior to August 30, 1883, the day on which the meeting was held at the Millard Hotel for the purpose of inducing certain Omaha parties to join Swan in his scheme for the purchasing of said lands and laying out a town. Of the said sum it is conceded that Mr. Swan furnished to Anderson \$15,808.57 on August 24, 1883, and the further sum of \$13,684 on the following day, which amounts were deposited by the latter in the Omaha National Bank to his own credit, and were paid by him on the contracts of purchase by checks drawn upon said bank. In fact all payments, both prior and subsequent to the organization of the syndicate, were made through Anderson. Plaintiff claims, and he so testified at the trial, that of the said sum of \$40,000 he contributed of his own funds the following amounts: May

30, 1883, \$1,900; June 4, 1883, \$579.90; June 11, 1883, \$1,020.20; June 23, 1883, \$1,000; June 25, 1883, \$3,000; June 27, 1883, \$2,000; August 15, 1883, \$750; that the foregoing sums were paid by his personal checks drawn for the several amounts upon the Omaha National Bank, payable to the order of C. R. Schaller, the person in whose name the contracts of purchase were taken. Checks for the said sums indorsed by Schaller, and stamped paid by the bank, were introduced in evidence, and copies thereof appear in the record. Plaintiff also testified to having paid of his own means several sums after the date of the meeting at the Millard Hotel, already alluded to, enough to swell the total amount alleged to have been contributed by him to \$10,576.15.

Mr. A. H. Swan testified on behalf of plaintiff to the effect that Anderson furnished of his own means to put into the purchase of these lands something in excess of \$10,000; and that at certain meetings of the trustees he stated to them that Anderson was interested in the said purchase.

If the foregoing was all the testimony to be found in the record relating to the furnishing of money by Anderson, the question would be an easy one to solve. There are, however, other facts and circumstances disclosed by the testimony, some of which will be now mentioned, which appellees insist established that Anderson is not now, nor ever was, financially interested in the said trust properties, but that the payments made by him were made with Swan's money, and solely for the benefit of the latter. It is uncontradicted that prior to the land transaction in question plaintiff had been interested in business with Mr. Swan at different places; and that from January, 1883, until September of the same year the latter was engaged in feeding cattle, and, when fat, shipping them to eastern markets for sale. Proceeds derived from the sale of stock were placed to Anderson's credit in the Omaha National Bank, and were carried into the same account as funds deposited

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which belonged to him individually; that plaintiff, during the same period, paid out for Swan, by checks upon said bank, large sums of money on account of the cattle business. The account of Anderson's with said bank was introduced in evidence and is included in the bill of exceptions, from which it appears that on the 30th day of May, 1883, the day on which the \$1,900 check already referred to was drawn to make the first payment on the lands, his bank account was overdrawn to the amount of \$758.46, excluding the amount called for in said check; and on the 11th day of June, 1883, when the check for \$1,020.29 was issued to make the third payment, Anderson's bank account showed a balance against him of \$7,926.95, not including the amount of the check. Between May 30th and June 12th but three deposits were made to his credit in the bank, aggregating \$6,022.21, and between the same dates he drew out of the bank, on account of the cattle business, \$10,351.86, besides \$579.71 to make the second payment on these lands, and also two other sums aggregating \$285.60, but for what purpose used the evidence fails to show. An examination of the subsequent items of the account, in connection with the evidence of Mr. Wallace, the bank cashier, shows that the above balance standing against Anderson on the bank books, on June 11, 1883, as well as all checks drawn after that date by Anderson to make payments on the lands, were subsequently met by deposits of moneys belonging to Swan. On June 14th a deposit of \$14,862.50 was made to Anderson's credit, which amount was the proceeds of a note for \$15,000, signed by Swan Bros. & Co., and L. M. Anderson, due in thirty days. It is conceded by appellant that the money derived from the discount of the note was not his own, but belonged to Mr. Swan. After the last mentioned date, and prior to August 1st, Anderson has credit on his account with seven items, aggregating over \$70,000, derived from the sale of cattle, and

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his account only shows three items to his credit after June 11th, which the evidence does not establish, came from the same source. One on July 3d, \$408.58; one on July 17th, \$255.88, and another on July 24th, \$230.20. Considering these facts in connection with appellant's inability on cross-examination, when requested so to do, to tell where he obtained the money he advanced on the lands, and the further fact that several of the trustees testified that no statements were ever made in their presence by Mr. Swan, or any one else, about Anderson being financially interested in the venture, but that at the meeting of August 30, 1883, which was attended by plaintiff, Mr. Swan did state that he had furnished the money to Anderson that had been paid on the lands, we are not willing to say that the trial court was not warranted in inferring that the amounts advanced by Anderson, although from funds deposited to his credit, were made with moneys belonging to Mr. Swan, and on his behalf.

Now, while the evidence does not make plain of whose funds some of the deposits in the bank to Anderson's credit were made, nor on whose account several of the items of disbursements were made, yet we think, inasmuch as the account was overdrawn several hundred dollars when the check for \$1,900 was drawn, and that the aggregate of all deposits made subsequently thereto, not established by the proofs to have come from the cattle business, was wholly inadequate to cover the sums claimed to have been advanced by plaintiff on account of the lands in dispute, Anderson was called upon to show, if such was the fact, that the overdraft at the bank was occasioned by disbursement relating to the feeding of cattle, and not on his individual affairs. In other words, that at the date of the overdraft appellant had drawn out of the bank of his individual funds, for Mr. Swan's benefit, and for which he had not been reimbursed, an amount sufficient, with his own means thereafter deposited, to cover all the checks given by him

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as payment on the lands. His failure to do so is a strong circumstance against his contention here made. We cannot assume, as counsel ask us to do, that certain items on the debit side of this account prior to May 30, 1883, related to the cattle business. There is certainly no presumption that they were not paid for Anderson's own benefit.

It is argued that even if Anderson used funds belonging to Mr. Swan to purchase these lands, the former became thereby indebted to the latter for the amount thus used, and Anderson acquired an interest in the trust property. This view might be taken, were it not for other facts appearing in the record, already alluded to, and others hereafter stated, which tend to show that Anderson did not regard the transaction at that time in that light.

Other matters are disclosed by the record which doubtless helped turn the scales against the plaintiff in the lower court. Some of these will be briefly stated. He only claims in his petition, and in his evidence, that he is entitled to one fifty-sixth interest in the trust property, by reason of his having contributed \$6,250 of the sum of \$350,000. He explains it in his testimony thus: That after the making of the trust deed he had an understanding with Mr. Swan, the financial agent and president of the syndicate, to the effect that he was to retain an interest to the extent only of \$6,250 in the property, and was to be reimbursed by the trustees the difference between that sum and \$10,576.15, the amount alleged to have been advanced by him from his own means. It is not contended that prior to the instituting of this action Anderson ever made any claim to the trustees for reimbursement of the excess of \$6,250, although there remained in their hands of the fund of \$350,000, after paying for the lands, and all expenses connected therewith, \$22,951.17. He was in the employ of the trustees at a stated salary during the major portion of the time they held title to the property and was

paid for his services from time to time, but made no claim that anything was due him on account of moneys advanced. He knew of the pendency of the suit against the trustees in the federal court, of the appointment of the receiver, of the conveyance of all the trust properties to Bosler, and by him to the South Omaha Land Company, and was employed by the receiver to look after the lands while they were under his care, and occupied the same position under the land company, yet he failed to assert any interest in the trust estate, and made no claim to the trustees for moneys paid out by him, until long after the sale of the land to the defendant corporation. It would seem reasonable, under the circumstances stated, if he had any rights or interest in these lands, or if anything was coming to him on account of their purchase, he would have asserted the same earlier than he did.

It appears that at the preliminary meeting held at the Millard Hotel on August 30, 1883, for the purpose of raising money with which to pay for the lands, it was determined that certificates should be issued to the subscribers to the purchase price upon the payment of their subscriptions, which certificates were to be converted into bonds thereafter to be issued by the trustees. A subscription for the bonds was started, by the terms of which each subscriber was to pay twenty-five per cent of the face value of the bonds by him subscribed for. Subscriptions were made for 1,400 bonds, aggregating \$1,400,000, being the exact number of bonds and the amount secured by the trust deed. There is evidence tending to show that Anderson was present at the meeting at which the subscription paper was drawn up and signed, yet his name nowhere appears on the list. The subscriptions were afterwards paid, thereby raising the fund of \$350,000, which is conceded to be the amount that went into the venture. True Anderson swears that he never heard of the subscription paper, but the preponderance of the testimony is against

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him. If he knew of it, as we think he must, a pertinent inquiry is, why did he not sign for the amount claimed to have been advanced by him, as did Swan? Every one, unless it be Anderson, who contributed to the project, signed the subscription paper. He admits he was present when the bonds were being signed, and they were distributed among the persons signing the subscription paper, according to the amount subscribed by each. From which, as well as from the recitals in the deed of trust signed by himself, Anderson was apprised of the fact that the bonds were about to be issued. He afterwards knew of their issue, for he purchased and held two of them. He also knew that the bondholders were the beneficiaries under the trust deed, and that by the eleventh article thereof, if, after the payment of the bonds secured thereby, any portion of the trust estate remained undisposed of, it was to be distributed among the bondholders of the third series; yet he made no claim to any portion of the bonds. Such conduct is convincing proof that he did not then consider he had any interest in these lands.

There is nothing in the letter written by Swan to Anderson, a copy of which is given above, which can be construed as conveying the idea that appellant was to become interested with Swan in the venture, but on the contrary the whole tenor of the language used therein tends to show that Swan had no such intention. He writes: "I will take in one or two moneyed parties, perhaps Scotch; have not yet determined who." There is nothing significant in the fact that Swan wrote Anderson about the proposed scheme, or that the deeds to the lands were taken in the name of the latter, since the two were connected by marriage, had been associated together in business, and at the time Anderson was receiving the moneys belonging to Swan arising from the sale of cattle, and was disbursing the same. The confidence reposed in plaintiff by allowing the title to the property to be taken in his name, under the

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circumstances, is perfectly reasonable and natural and entirely consistent with the theory that plaintiff was not financially interested in the lands. Our conclusion is that the evidence is not sufficient to establish a trust in favor of the plaintiff.

It is argued by counsel for appellant that the transfers of the property to Bosler and by him to the South Omaha Land Company were void, for the reason that a portion of the defendant trustees were interested therein as purchasers, and others of them were paid a bonus by Bosler to prevent their resisting the transfer. While the law forbids one who holds property in trust from becoming a purchaser thereof from himself, either directly or indirectly, plaintiff is not in a position to invoke the rule in this case, inasmuch as he had no interest in the property. Only those beneficially interested in the trust estate could question the transfers on the ground urged. For the reasons stated the judgment below is

AFFIRMED.

THE other judges concur.

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FREDERICK WOHLBERG V. JOHN MELCHERT.

[FILED DECEMBER 16, 1892.]

- 1. Bill of Exceptions:** AFFIDAVITS used at the hearing of a motion in the district court, to be available in this court, must be brought into the record by a bill of exceptions.
- 2. Trial: ADMISSION OF INCOMPETENT EVIDENCE: OBJECTIONS: REVIEW.** When incompetent or illegal testimony is admitted upon a trial without objection, error cannot be predicated in a reviewing court upon the admission of such testimony.
- 3. Review: NEWLY DISCOVERED EVIDENCE AS GROUND FOR NEW TRIAL: BILL OF EXCEPTIONS.** A party is not entitled to re-

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view, on appeal or error, the decision of a trial court in denying a new trial upon the ground of newly discovered evidence, unless all the testimony given on the hearing of the motion is set out in a bill of exceptions.

4. **Sufficiency of Evidence: DAMAGES.** *Held*, That the evidence in the case is sufficient to sustain the verdict, and that the damages assessed by the jury are not excessive.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

E. P. Holmes, and *Edwin M. Lamb*, for plaintiff in error.

Pound & Burr, contra.

NORVAL, J.

This action was brought in the court below by defendant in error to recover damages for personal injuries alleged to have been sustained by John Melchert, a minor, resulting from kicks given by the plaintiff in error. The jury returned a verdict in favor of the plaintiff below, assessing his damages at the sum of \$2,000. Judgment was entered upon the verdict, to reverse which the defendant brings the cause to this court on error.

The first question presented for consideration is raised by the motion filed by defendant in error to strike out of the transcript and record, copies of certain affidavits made by Frederick Wohlenberg and E. L. Holyoke, which were filed in the office of the clerk of the district court, and which, presumably, judging from their character, were used on the hearing of the motion for a new trial. The motion to strike is well taken, for the reason that the affidavits in question were not made a part of the record in the case by bill of exceptions. Affidavits used at the hearing of a motion in the district court, to be available in the supreme court, must be included in the bill of exceptions. This is too well settled to require the citation of cases.

Complaint is made that the verdict is not sustained by

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the evidence, and that the damages assessed by the jury are excessive. The record shows that John Melchert, in October, 1882, at the time the alleged injuries were received by him, was residing with his step-father, the plaintiff in error, and was at that time about ten years of age. We quote from the bill of exceptions that portion of the direct testimony of the defendant in error, which describes the nature and character of the injury and how it occurred, as follows:

Q. Where were you when you were injured?

A. In the house.

Q. Who injured you?

A. Fred Wohlenberg.

Q. How did it occur?

A. It was in the morning. The three boys slept upstairs. He called me, and told me to call the boys. I called them, and he said, what are you doing up there, you damned hog? And he kicked me on the side, kicked me down. I cried; my mother came in and he kicked me twice after that.

Q. Where were you kicked?

A. In the dining room of his house.

Q. Where did he kick you each time?

A. On the side and back.

Q. What did he have on his feet?

A. He had boots.

Q. How large were the boots?

A. About number 10.

Q. How hard did he kick?

A. He kicked hard enough to kick me down.

Q. How many times?

A. Three times.

Q. Who were present and saw this?

A. My mother, sister, and brother.

Q. Which brother was it?

A. My half brother, Fred Wohlenberg.

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Q. The son of Mr. Wohlenberg?

A. Yes, sir.

Q. Before that time did you ever have any pain or sickness?

A. No, sir; I was healthy.

Q. Can you describe the pain that was occasioned by these kicks?

A. Yes, I can. It is such that I cannot do any work, and whenever I do any work it lays me up. I have pain all the time.

Q. How was it at that time?

A. I don't hardly remember, it has been so long ago. I know it was awful bad.

Q. What did you do, and what did your mother do, if anything, for this injury?

A. We did nothing for a while, and then I went to Dr. Peters, who treated me for my kidneys, but did not do me any good.

Q. What then did you do?

A. I did not do anything until a year and a half ago, when I went to Dr. Hart, who put a plaster of Paris jacket on.

Q. How many of these plaster of Paris jackets did you have?

A. Two.

Q. How long did you wear them?

A. About two months.

Q. Explain what the plaster of Paris jackets are?

A. They fit something like a corset, only closer to the body.

Q. They are cast right on the body?

A. Yes, sir.

Q. Do you know the object and purpose of wearing them?

A. They thought it would strengthen my back and hold that rib in place.

Q. Do you know what part of your body was injured by these kicks?

A. Yes, sir.

Q. Where was it?

A. It was the last floating rib, and the spine.

Q. Did you have any curve in the spine prior to that time?

A. Not that I know of.

Q. Do you know how your spine has been since that time?

A. Yes, sir.

Q. How was it?

A. Curved.

Q. What has been your business since?

A. I worked a long time at the 99-cent store, worked on a farm a while, and for the State Journal Company.

Q. Who did you work for at the 99-cent store?

A. Mr. Shelton.

Q. How long did you work for him?

A. Very nearly two years.

Q. While you worked for him did you suffer pain resulting from your injuries?

A. Yes, sir; I always suffer pain in my side and in my back whenever I do hard work.

Q. How is it at the present time?

A. There is a pain there now, a steady pain; I can hardly explain it.

Q. How is it when you lift any article, especially one of any weight?

A. It hurts me a great deal worse than at other times.

Q. Did you see any other doctor than Dr. Peters?

A. Yes, sir; Drs. Mitchell, Richter, and Woodward.

Q. Did you consult any physician out of this town?

A. Yes; some in Omaha.

Q. Who were they?

A. Dr. MacNamara.

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Q. What did you go there for?

A. To have my back straightened by the electric treatment. I was at the hospital.

Q. What objections did he have to your going?

A. He made none that I knew of, because I was not staying there.

Q. Why was that?

A. He drove me away.

Q. When?

A. About a year ago last summer.

Q. What did he drive you away for.

A. We had a fight down there at the house when I had on one of the plaster of Paris jackets. We were playing at throwing ball, my eldest brother and I. Mother called us to supper, and when we got around the corner, he struck me in the face and pounded me all up, when I did nothing; he told me to keep away from the house. That was the 8th day of April; it will be three years.

Q. Three years next April?

A. No; two.

Q. Did you ever talk with your step-father about this pain in your side?

A. I have told the whole family about it.

Q. Have you talked to him about it in the presence of the family?

A. Yes.

Q. What did he ever do in regard to it?

A. He did not do a thing, he said I was always pretending to have a pain, and I done it to get out of work.

Q. What did you tell him?

A. I told him there was a pain there; I did not know where it came from at the time; I did not know what was the matter until I began doctoring.

Q. What did he say to that?

A. He kept on telling me I was lazy, and trying to make expense.

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Q. Did you ever receive any injuries to your spine or back, or any of your ribs, at any other time except from those kicks you have spoken of?

A. No, sir; I never have.

Q. What did MacNamara in Omaha do for your back?

A. He told me my back was curved, my spine was curved, and one of the floating ribs was broken, and he gave me electric treatment to draw the pain out.

Q. State how long a time, if any, between the time you received these kicks and the present, that you have been free from pain.

A. I have not been free from pain at all.

Q. Whose farm was it you went to work on?

A. Mr. Hickson's.

Q. When was it you went to work for him?

A. Four years ago.

Q. How long did you work for him?

A. Two months.

Q. Why did you quit?

A. I could not stand the work on account of my back.

Q. What kind of work were you doing?

A. Plowing and cultivating.

Q. When you came in from there where did you go to work?

A. I went to work for Mr. Shelton again.

Q. Did you go to work for the Journal Company at any time?

A. I went to work for the Journal Company after I quit Shelton.

Q. In what department?

A. In the book-binding.

Q. What were you doing?

A. Learning the trade. I was carrying books down to the job room and getting stock in.

Q. What did you quit there for?

A. I could not stand it for the pain in my back and side.

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Q. How long did you work for them?

A. About six months.

Q. When was it you ascertained what was the matter with your back?

A. When I first consulted a physician.

Q. When did you first find out what your injury consisted of?

A. About two years ago.

Q. Was that the time you went to Omaha?

A. No, sir; that was when Dr. Dogge here told me about it.

Q. You consulted him, did you?

A. Yes, sir.

Q. With what result?

A. He said that my spine was out of order, out of shape; but I did not doctor with him any.

Q. Who advised you to go to this Omaha concern?

A. My mother.

Q. How is it in your sleep?

A. I have to lie on my right side. I cannot lie on my left at all. I have to lie on my back, or on my right side.

The cross-examination of defendant in error tends to strengthen his testimony given in chief, instead of weakening it. His statement, as to the circumstances of his receiving the injury, is fully corroborated by his mother, Catherine Wohlenberg, his sister, Hannah Melchert, and his half-brother, Fred Wohlenberg. These persons further testified that before receiving the injuries defendant in error's health was good, was never sick, nor did he complain of his side and back to their knowledge; that since he was kicked by plaintiff in error he has been continually complaining of pain in his side and back, and has been unable to stand hard work.

Dr. F. B. Righter testified that he has been a practicing physician and surgeon for twenty-five years, thirteen of them in the city of Lincoln; that before the trial he made

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a careful personal examination of the plaintiff, particularly his spine and the lower part of his chest ; that he found that at some time there had been a fracture of one of the lower ribs on the left side, and a curvature of the spine to the right, about three-quarters of an inch, opposite such fracture, about an inch and a half from where the rib joins the spinal column; that in his opinion, based on the amount of callous, the rib was broken entirely through; that in a healthy person such curvature is caused only by an injury to the spine; that a curvature might be caused by constitutional diseases, such as scrofula, but in such case there would be apt to be some trace of the disease, and that "this case did not look like that"; that such a curvature is a permanent injury; that in his opinion, based on the proximity of the fracture and curvature, the fact that the curvature is opposite the fractured rib and the convex position of the spine, the fracture of the rib and curvature of the spine were simultaneous; that on account of being thus affected, he has not the strength nor the endurance of a normal person; that the curvature prevents, to some extent, the working of the spinal muscles; that while the fracture does no damage to the rib, it has produced an affection of the nerve on that side, "so there is great soreness around the injury with the result of great irritation of the nerve in the spine and the feeling of sensitiveness at the ends of that nerve."

The plaintiff in error testifies that he did not kick defendant in error at the date claimed, although he admits that he kicked and hit him at other times; admits that his step-son has been injured in the side and back, from which he will never recover, and attributes it to different causes, namely: To sickness when John Melchert was a child about two years old, then to a fall received while skating on the ice, and again to a fight with another boy. The clear preponderance of the testimony is against each of these theories, and establishes that Wohlenberg kicked de-

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fendant in error, thereby breaking one of his ribs and permanently injuring his spine; that before receiving the injury he was always hearty and free from pain, but since which time he has constantly suffered with his side and back, and has been, and still is, unable to perform hard work.

Plaintiff in error also introduced upon the trial testimony tending to prove that he was absent from the city on the 15th day of October, 1882, the day named by the defendant in error and his witnesses, on which the injury was inflicted.

Drs. Woodward and Andrews testified, in effect, that they made an examination of Melchert's body, but did not find anything peculiar about his back in any way, did not discover any curvature of the spine, nor observe that any of the ribs were fractured. The proofs show that these medical experts did not make a very critical examination of the body of Melchert. Neither examined the spine nor looked for a fractured rib.

It has been the uniform holding of this court that it will not reverse a judgment on the ground that it is against the evidence, unless the finding of the trial court is clearly wrong or is manifestly against the weight of the testimony. Applying this rule to the case at bar it is obvious that the verdict of the jury should not be disturbed. The testimony of the plaintiff below, and his witness, if true, of which the jury were the sole judges, is ample to sustain the verdict and judgment. The damages are not excessive, but are fully justified by the evidence.

It is urged that the court below erred in allowing the defendant in error to testify that his step-father beat him cruelly about two years before the trial. The record discloses that this testimony went to the jury without objection; hence the error, if any, in admitting it was waived. When incompetent or illegal testimony is admitted upon a trial without objection, error cannot be predicated in the supreme court upon the admission of such testimony.

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We are finally asked to reverse the judgment upon the ground of newly discovered evidence. Although it is one of the causes assigned in the motion for a new trial, we are precluded from considering the question, inasmuch as the evidence submitted to the lower court in support of and in resistance of the motion is not before us. A party is not entitled to review in the supreme court the decision of the district court in denying a new trial upon the ground of newly discovered evidence, unless all the testimony given on the hearing of such motion is set out in a bill of exceptions. And this for the purpose of enabling the reviewing court to ascertain whether the moving party has been injured by the ruling. Prejudicial error is never to be presumed, but must be shown by the record. Our conclusion is that no sufficient ground is pointed out for disturbing the verdict, and the judgment is

AFFIRMED.

THE other judges concur.

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LEWIS A. WINCHELL, SHERIFF, v. JOHN MCKINZIE
ET AL.

[FILED DECEMBER 16, 1892.]

1. **Attachment on Claim Not Due: JURISDICTION OF COUNTY JUDGE: ORDER GRANTING.** A county judge has jurisdiction, under section 238 of the Code of Civil Procedure, to grant an attachment on a claim not due, upon the proper affidavit being made and filed, showing the existence of at least one of the statutory grounds or causes for issuing an attachment on a debt before due.
2. ———: **PRACTICE: ORDER GRANTING, ISSUED ON AFFIDAVIT FOR ATTACHMENT.** No written application for an order allowing an attachment, other than the filing of the proper affidavit, is necessary.

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3. ———: ———: ACTION COMMENCED BEFORE COUNTY JUDGE: ISSUANCE OF WRIT SUFFICIENT. When the county judge issues a writ of attachment in a case commenced before him, it is not necessary to the validity of the writ that he should spread upon his docket a formal order allowing the attachment. In such case the issuing of the writ is, in itself, the granting of the order.
4. ———: IRREGULARITIES: OMISSION OF SEAL OF COUNTY COURT: COLLATERAL ATTACK. The county judge of P. county made an order granting an attachment in an action to be brought in the district court of the county, and signed the same officially, but he failed to attach thereto the seal of the county court, which order was filed with the clerk of the district court, who issued a writ of attachment thereon. *Held*, That the omission of the seal of the county court did not make the order absolutely void, but an irregularity which could be taken advantage of only by the defendant in attachment, in the proper mode. The question cannot be raised by third parties in a collateral proceeding.
5. Replevin of Goods Taken by Sheriff Under Attachment: DEFENSE: JUSTIFICATION: BURDEN OF PROOF. When a sheriff, under and by virtue of a writ of attachment, levies upon property found in possession of a stranger to the suit, in an action of replevin therefor by such stranger, the officer, to justify the taking, is required to show that the attachment writ was regularly issued; that is, that the writ is regular on its face, and was issued upon a sufficient affidavit by a court having jurisdiction of the parties and the subject-matter of the action.
6. ———: IRREGULARITIES IN ATTACHMENT PROCEEDINGS: COLLATERAL ATTACK. Where proceedings in attachment are irregular and erroneous, but not void, such errors and irregularities cannot be taken advantage of by third parties in a collateral proceeding.

ERROR to the district court for Perkins county. Tried below before CHURCH, J.

Cornish & Robertson, for plaintiff in error.

Saunders & Prime, and *John J. Halligan*, contra.

NORVAL, J.

Lewis A. Winchell, the plaintiff in error, was the sheriff of Perkins county. James A. Hatcher and Fred L.

Knight were formerly engaged in the mercantile business in the town of Madrid, in said county, under the firm name of Hatcher & Knight, and on the 11th day of June, 1889, they executed and delivered a bill of sale of their stock of goods to John McKinzie and George W. Snyder, defendants in error, who took possession of the goods under said bill of sale. Shortly thereafter two writs of attachment against the firm of Hatcher & Knight, one issued by the clerk of the district court of Perkins county, the other issued out of the county court of said county, were placed in the hands of Lewis A. Winchell, as sheriff, who levied upon said stock of goods by virtue of said writs of attachment. Subsequently defendants in error brought this action in replevin against plaintiff in error to recover said goods. The property was taken under the replevin writ, and the possession thereof delivered to plaintiffs below. There was a trial to a jury, which resulted in a verdict and judgment in favor of the plaintiffs.

On the trial in the court below plaintiffs introduced in evidence the bill of sale above mentioned, and evidence tending to prove that they had taken possession of the goods under the bill of sale.

The defendant attempted to justify under the two writs of attachment, and to that end he offered in evidence the files and record in a cause in the district court of Perkins county, wherein M. E. Smith & Co. were plaintiffs and Hatcher & Knight were defendants, consisting of the precept, summons, with the return of the officer indorsed thereon, showing service on defendants, affidavit for attachment, undertaking, order of attachment, appraisement, the order of the county judge of Perkins county allowing a writ of attachment to issue in the action, demurrer of Fred L. Knight to the petition, answer of James S. Hatcher, and the judgment in favor of the plaintiffs in said suit. To the introduction in evidence of said papers and records the plaintiffs objected on the ground that no seal was attached

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to the order of the county court allowing the writ of attachment; that the court had no jurisdiction to issue the summons, for the reason no order of the county judge allowing a writ of attachment on a claim before due to issue in said action was on file with the clerk at the time the summons was issued, and that the judgment was incompetent and immaterial, and the court rendering the same was without jurisdiction, which objections were sustained by the court, and defendant excepted.

Defendant then offered in evidence the docket of the county court of Perkins county, showing the affidavit filed in the said court for an order allowing a writ of attachment to issue, and the order of the county judge granting the writ of attachment; to which the plaintiffs objected as incompetent, immaterial, and irrelevant. The objection was sustained and the defendant excepted.

The defendant further offered to prove by the county judge of Perkins county that the order allowing the writ of attachment to issue in said case of *M. E. Smith & Co. v. Hatcher & Knight* was made by said county judge on the application of the plaintiffs in said action, and that by mistake or oversight the seal of the county court was not attached to said writ; to which plaintiffs objected as before. The objection was sustained and the defendant excepted.

The defendant also offered in evidence the petition, affidavit for attachment, bond in attachment, summons and return, writ of attachment and return thereon, appraisal, answers, motion to the jurisdiction of the court, motion to dissolve the attachment, judgment, and docket entries in a cause in the county court of Perkins county, wherein Kirkendall, Jones & Co. were plaintiffs and Hatcher & Knight were defendants; to which plaintiffs objected for the reason no foundation had been laid for their admission, that no application had been made for the writ of attachment, and no order had been made granting the

same; and for the further reason the county court has no jurisdiction in that kind of a case; which objections were sustained and the defendant excepted.

The foregoing rulings of the trial court are now assigned for error. Both writs of attachment, under which plaintiff in error sought to justify, were issued upon claims not then due. Authority is conferred by statute upon creditors to maintain an action by attachment on a debt before it is due, in certain specified cases. Among others, where the debtor has sold or disposed of his property with the intent to defraud his creditors, or to hinder or delay them in the collection of their debts; and this is one of the grounds set up in each of the attachment affidavits. It is not claimed that the facts stated in the affidavits were insufficient to authorize the issuing of the attachments and the bringing of the suits. Power is conferred upon a county judge by section 238 of the Code to make an order allowing an attachment to issue on a debt not due, upon the proper affidavit being made and filed. This was expressly decided in *Reed, Jones & Co. v. Bagley*, 24 Neb., 336, and must be regarded as the settled law of the state.

It is urged that the writ of attachment in the case of M. E. Smith & Co. is void because no formal written application was made to the county judge for the allowance of an attachment thereon, and for the reason that the order of the county judge authorizing the clerk of the district court to issue a writ of attachment in said suit was not made under the seal of the county court. The attachment proceedings in the case of Kirkendall, Jones & Co., it is claimed, are invalid on the ground that no written application was made for the attachment, and that no order was made by the county judge granting the writ. These several objections we will now consider.

Section 237 of the Code enumerates the grounds for which an attachment may be granted in actions on debts before due. Section 238 provides that "the attachment

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authorized by the last section may be granted by the court in which the action is brought, or by a judge thereof, or by the probate judge of the county, but before such action shall be brought, or such attachment shall be granted, the plaintiff, his agent or attorney, shall make an oath, in writing, showing the nature and amount of the plaintiff's claim that it is just, when the same shall become due, and the existence of some one of the grounds for attachment enumerated in the preceding section." It will be observed that the section quoted only requires that before an action can be properly commenced on a claim before it is due, or an attachment shall be allowed, the plaintiff, his agent or attorney, shall make an oath, in writing, setting forth the nature and amount of the claim, that it is just, when the same will become due, and the existence of at least one of the statutory grounds or causes for the issuing of an attachment on a claim not due. We have been unable to find any statute, and none has been cited by counsel, which requires as a condition precedent to the granting of an attachment in such actions that a written application therefor, other than the proper affidavit, must be made to the court or judge. It is no more necessary to do so in attachments on debts not due than in ordinary attachments, and in our view it is not required in either case. To hold that it is necessary would be to inject words into the statute. In the absence of any statutory requirement as to a written request, we think it sufficient that the proper affidavit entitling the plaintiff to an attachment be in fact made and filed; the filing of which in itself is a request to grant the writ and confers upon the court or judge jurisdiction to act. However, in one of the attachment cases we are considering, that of M. E. Smith & Co., a written request for an attachment was made. The affidavit filed with the county judge as the basis of his order closes as follows: "Affiant therefore asks for an order granting an attachment against the property of the defendants." This, it would seem, ought

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to be sufficient, even though the construction contended for by defendants in error should obtain.

It is urged that the files and record in the case of Kirkendall, Jones & Co. were properly excluded, because the county judge did not spread upon his docket a formal order authorizing the granting of an attachment. The docket entry relating to that matter is as follows:

“Issued summons and order of attachment, both returnable July 1, 1889, and delivered the same to L. A. Winchell, sheriff, for service.

B. F. HASTINGS,
“County Judge.”

The suit of Kirkendall, Jones & Co. was brought in the county court. The issuing of the writ of attachment by the judge thereof was in itself the granting of the order. The entry made upon his docket above quoted is sufficient evidence of the fact that an attachment was allowed; that was all that was necessary. As the county judge is his own clerk, there is no reason why he should make a written order authorizing and directing himself to issue an attachment; but when he grants an attachment on a debt not due, in a case where the writ is to be issued by the clerk of the district court, the judge must make an order allowing the attachment and sign the same officially, since the clerk has no jurisdiction to issue a writ of attachment on a debt before due, unless the order has been allowed by his court or a judge thereof, or the county judge.

In the suit of *M. E. Smith & Co. v. Hatcher & Knight* the county judge of Perkins county made a written order authorizing an attachment therein, which order was signed by him officially, but he failed to attach thereto the seal of the county court. This order was filed in the office of the clerk of the district court before the attachment was issued. Did the omission of the seal invalidate the proceedings? We think not. The affixing of the official seal to such a document is for the purpose of authentication, and the failure to attach it is at most a mere irregularity. The signa-

Winchell v. McKinzie.

tures and official capacities of county officers are matters of public notoriety, and the court will officially take notice of them. The district court of Perkins county is presumed to know, and was bound to take judicial notice, that B. F. Hastings was at the time county judge of that county and of the genuineness of his signature to the order in question. (Wade on Notice, sec. 1413; *Jones v. Gales's Curatrix*, 4 Mart. [La.], 635; *Scott v. Jackson*, 12 La. An., 640; *Templeton v. Morgan*, 16 Id., 438; *Wetherbee v. Dunn*, 32 Cal., 106.)

Counsel for defendants in error cite in their brief authorities from other states which lay down the doctrine that an execution or writ of attachment without the seal of the court from whence it issues is invalid, and that the defect is of such a character that it cannot be cured by amendment. Such is not the rule in this state. In *Taylor v. Courtney*, 15 Neb., 190, the seal had been omitted from an execution; lands had been sold, and the sale confirmed, after which leave was given to amend the execution by affixing the seal to the same. It was held that the execution without a seal is not void, but may be amended, although the sale made thereunder has been confirmed. Many cases are cited in the opinion to sustain the proposition, and there can be no doubt as to the soundness of the rule stated. The failure to attach the seal would not render the process absolutely void. Counsel concede that the order of the county judge granting the attachment could be amended by attaching the seal. In effect, this is an admission that the order is not void, for there must be something to amend before an amendment can be made, and a void order is a nullity, and cannot be amended.

Counsel for defendants in error urge that this case is controlled by the decisions of this court, wherein it is held that when an officer attempts to justify the seizure of goods found in the possession of a stranger claiming title, that the mere production of the writ is not a sufficient justifi-

cation, but that the officer must go further and show affirmatively that the writ was regularly issued. In none of the authorities cited by counsel, nor in any of our cases, so far as we are aware, has it been held that when a sheriff or other officer seeks to justify the seizure of property under a process regular on its face, mere technical errors intervening after the issuing of the writ may be shown in a collateral attack, and when proven will invalidate the entire proceedings.

True, in the cases referred to in defendants' brief it is said, that it must be "shown affirmatively that the writ was regularly issued." By that it was meant that it must appear that the process was issued by a court having jurisdiction of the parties and the subject-matter of the action, and that the steps taken leading up to the writ were not void. It was not meant that the officer was required to prove that the proceedings were free from mere errors and irregularities which are not of such a nature as to affect the jurisdiction, although they might be sufficient grounds for reversal by a suitable proceeding in a tribunal having authority to review them. There are many errors occurring in a trial of a cause which may be waived by the parties, and if the one against whom they are made fails to take advantage of the same, strangers to the record cannot do so. Suppose an attaching creditor files the proper affidavit in attachment, and the writ issues without his having given a bond for the indemnity of the defendant, in a case where one is required by statute, his failure to file an undertaking would not render the attachment absolutely void. It would be a mere irregularity, of which the defendant in attachment alone could take advantage.

The case of *Connelly v. Edgerton*, 22 Neb., 82, was a suit in replevin against an officer who claimed possession of the property by virtue of the levy of certain writs of attachment. The court in the syllabus say: "Where proceedings in attachment are irregular and amendable, but not

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void, and no objection is made thereto by the defendant in the action, such proceedings cannot be attacked or questioned collaterally by third parties." (See *Rudolf v. McDonald*, 6 Neb., 166.)

The defendants in the case of M. E. Smith & Co. never called the attention of the court in which the case was pending to the fact that the seal was omitted from the order of the county judge granting the attachment therein, although they both appeared in the action. Had the court's attention been challenged to the defect, doubtless it would have permitted an amendment. As the defendants in that suit were satisfied, the defendants in error herein cannot be heard to complain. Our conclusion is that the records and files in the attachment cases should have been received in evidence, and that the court below erred in excluding the same. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

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| 85 | 822 |
| 86 | 412 |
| 35 | 822 |
| 47 | 9 |
| 47 | 238 |
| 85 | 822 |
| 51 | 688 |
| 86 | 822 |
| 60 | 14 |

STATE OF NEBRASKA, EX REL. CHARLOTTE A. COCHRAN
ET AL., V. MELVILLE R. HOPEWELL, JUDGE.

[FILED DECEMBER 16, 1892.]

1. Bill of Exceptions: TIME FOR PREPARATION: LIMITATION.
The time within which a party must prepare and serve a bill of exceptions begins to run from the final adjournment of the term of court at which the cause was decided, and not from the date of the formal entry of the judgment by the clerk upon the court journal.
2. ———: ———: ———. *Bickel v. Dutcher*, 35 Neb., 761, distinguished.

State, ex rel. Cochran, v. Hopewell.

3. ———: ———: ———. When a cause is tried to the court, without the intervention of a jury, at one term of the district court and taken under advisement, and final decree rendered at a subsequent term of said court, the time for settling of a bill of exceptions begins to run from the close of the term at which the decision was rendered.
4. **Record: CONCLUSIVENESS OF RECITALS: REMEDY FOR ERRONEOUS RECORD.** The recitals of the record of a trial court are conclusive upon the parties as to the term at which a decree was rendered. If the record is incorrect, the remedy is by a proper proceeding in the trial court to secure a correction of the same.

ORIGINAL application for *mandamus*.

Brome, Andrews & Sheean, for relators.

B. G. Burbank, contra.

NORVAL, J.

This is an original application for a writ of *mandamus* to compel the defendant to sign a bill of exceptions in the case of Thomas Hines against the relators and others, which was tried before respondent in the Douglas county district court. The action above mentioned was to foreclose a mechanic's lien. Affidavits were filed to the effect that the cause was tried at the May, 1891, term of said court, and the decision was orally announced in open court in the presence of the parties on the 8th day of August, 1891, the same being a day in said May term of court; that on the same day a draft of the decree was prepared by the attorney for the successful party, which was presented to the attorney for the relators as well as the attorneys for all the other parties interested in the litigation, who approved the same; that immediately thereafter, and on the said 7th day of August, the said draft of the decree was filed with the clerk of the district court, who indorsed thereon the following: "Filed August 8, 1891. Frank E. Moores, Clerk." That, by the terms of the decree so

State, ex rel. Cochran, v. Hopewell.

drawn, relators were given forty days from the rising of the court to prepare and serve their bill of exceptions; that the May term of the district court of Douglas county finally adjourned on the 15th day of August, 1891; that the said draft of the decree was not presented to respondent for his signature until the 30th day of December, 1891, which was a day in the September term, when the draft of the decree was approved by him, and it was then recorded in the journal of the district court as a final decree as of the September term; that the September, 1891, term of the district court of Douglas county adjourned without day on the 23d day of January, 1892; that on the 20th day of March, 1892, and within forty days from the rising of said court for said term, relators caused to be prepared and served upon counsel for the adverse parties a true bill of exceptions, who refused to receive the same, and declined to propose any amendments thereto; that the proposed bill was thereupon presented to respondent for his signature, who refused to sign or allow the same on the ground that it had not been served upon the adverse parties within forty days from the final adjournment of the term of court at which the decree was rendered.

It is conceded that the proposed bill is correct. Was it completed, served upon the parties in interest, and presented to the judge for his signature within the time allowed by statute? Section 311 of the Code of Civil Procedure, relating to bills of exceptions, provides that "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment if desired," etc. Manifestly under the above statutory provision the time within which a party must complete and

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serve his bill of exceptions begins to run from the final adjournment of the term of court at which the trial is had and the decision rendered. This is conceded by respondent, but he insists that the case of *Hines v. Cochran et al.* was tried and decided at the May, 1891, term of the district court, therefore relators only had forty days from the adjournment *sine die* of said term to reduce their exceptions in the case to writing and serve the same upon the adverse parties. The case of *Horn v. Miller*, 20 Neb., 98, is cited to sustain his contention. It was there held by a divided court, that the time in which an appeal to the supreme court must be taken commences to run from the date on which the trial court orally announces its conclusion and judgment and not from the day on which the judgment is actually and formally entered on the journal by the clerk in vacation. The decision in *Horn v. Miller* is no longer to be regarded as a precedent on that question, since that case has, in direct terms, been overruled by this court in the opinion written by Judge POST in *Bickel v. Dutcher*, 35 Neb., 761, wherein it is stated that "the time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals by filing in this court a certified transcript of the proceedings of the district court." The question involved in *Bickel v. Dutcher* was carefully considered, and we are satisfied the rule there announced is sustained both by reason and the weight of authority, and should be followed in similar cases. But we are unwilling to hold that the time begins to run for the settling of a bill of exceptions from the date of the formal entry of the judgment or decree by the clerk upon the journal of the court. The statutory provision which limits the time for appeals from the district court differs materially from the one which governs the settling of bills of exceptions. The former requires that the transcript must

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be filed in the office of the clerk of the supreme court "within six months after the date of the rendition of the judgment or decree or the making of the final order," while the section of the statute relating to bills of exceptions above quoted provides that the party must reduce his exceptions to writing "within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*." In the one case time is computed from the rendition of the judgment or decree, while in the other it is from the date of the final adjournment of the term. There is good reason for holding that for the purpose of taking an appeal a judgment is not considered rendered until it is actually entered upon the record, since until such entry is made there is no authentic record evidence that a judgment has been rendered in the case. It is impossible for a party to perfect an appeal before he can obtain a transcript of the proceedings. The settling of a bill of exceptions does not depend upon the formal entry of a judgment or decree upon the journal of the court. We know that it frequently happens that judgments are not actually spread at large upon the records until after the adjournment of the term at which they were orally announced by the court, when they are entered by the clerk upon the court journal as of the date and of the term at which the decisions were rendered. In such a case the time of settling a bill of exceptions begins to run from the final adjournment of the term of court, and not from the date of the formal entry of the judgment by the clerk.

At which term of the district court was the decree in *Hines v. Cochran* rendered? If the determination of the question depended upon the affidavits filed in this case, we would be forced to the conclusion that the decree was pronounced at the May, 1891, term. But there is in the record other evidence, of a higher character, of the date of the rendition of the decree. A certified copy of the journal

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entry of the district court in said cause is before us, which recites that "At the September term of said court, and on the 30th day of December, 1891, a decree was rendered herein as follows:

"THOMAS HINES

v.

CHARLOTTE A. COCHRAN ET AL. }

"This cause came on to be heard at a previous term of this court upon the petition of the plaintiff, the answer and cross-petitions of * * *, the several replies filed herein, and the evidence, and being submitted to the court, and the court, being fully advised in the premises, find * * * and forty days from the rising of the present term to prepare and serve a bill of exceptions herein."

It appears from the above journal entry that the cause was tried at the May, 1891, term, and the decision was rendered at the following September term. The record is conclusive as to the time the decree in question was rendered, and neither party can contradict the statements of the record by affidavits or other evidence. If the record is incorrect as to the time the decree was rendered, the remedy is by a proper proceeding in the trial court to correct the error, if one was made. The record of the trial court imports absolute verity. (*Haggerty v. Walker*, 21 Neb., 596; *Worley v. Shong*, 35 Neb., 311; *McAllister v. State*, 81 Ind., 256.) That the cause was tried at the May term of the district court is quite immaterial. The time of completing and serving a bill of exceptions in the case did not commence to run from the adjournment of that term, for the reason no decision was made until the succeeding term. In a cause tried to the court without the intervention of a jury at one term and decided at a subsequent term, it has been held that the party has the statutory time for reducing his exceptions to writing after the close of the term at which the decision was made. (*Wineland v. Cochran*, 8 Neb., 528.)

Hines v. Cochran.

The conclusion is irresistible, that the proposed bill of exceptions in the case was prepared and served in ample time, and that the respondent should have signed and allowed the same. This being the opinion of the court, we doubt not that the respondent will promptly discharge such duty and not wait for a writ to issue. The writ therefore will be withheld.

JUDGMENT ACCORDINGLY.

THE other judges concur.

35 828
59 622

THOMAS J. HINES, APPELLEE, v. CHARLOTTE A. COCHRAN, APPELLANT, IMPLEADED WITH PHILADELPHIA MORTGAGE & TRUST COMPANY ET AL., APPELLEES.

[FILED DECEMBER 16, 1892.]

1. **Appeal: GROUNDS FOR DISMISSAL: FAILURE TO SETTLE BILL OF EXCEPTIONS.** It is the settled law of this state that an appeal will not be dismissed on the ground that no bill of exceptions has been settled and allowed.
2. **Practice in Supreme Court: MOTION TO DISMISS APPEAL: MERITS OF CAUSE NOT CONSIDERED.** On a motion filed by an appellee to dismiss an appeal out of this court, we will not consider the merits of the action, but will only inquire whether an appeal lies, and whether it is properly taken and perfected.

MOTION to dismiss appeal from a judgment rendered by the district court for Douglas county.

B. G. Burbank, for the motion.

H. E. Cochran, contra.

NORVAL, J.

This is an appeal from the district court of Douglas county. The transcript contains the pleadings and decree, and a draft of a bill of exceptions which has not been signed and allowed either by the trial judge or the clerk of the district court. The appellees move to dismiss the appeal for the reason that no bill of exceptions was settled by the district court as required by law. The motion must be denied. It has been settled by repeated decisions of this court that a motion to dismiss an appeal or proceeding in error will not be sustained on the ground that no bill of exceptions has been settled and allowed. (*Mewis v. Johnson Harvester Co.*, 5 Neb., 217; *Hollenbeck v. Tarkington*, 14 Neb., 430; *Baldwin v. Foss*, Id., 455; *Carlson v. Beckman*, 35 Neb., 392.)

There may be other questions presented by the record for consideration not depending upon a bill of exceptions. On a motion filed by an appellee to dismiss an appeal, this court will not consider the merits of the controversy, but will only inquire whether an appeal lies, and whether it is properly taken and perfected. The motion to dismiss is

OVERRULED.

THE other judges concur.

GEO. W. WHITLOCK, APPELLEE, V. WILLIAM GOSSON
ET AL., APPELLANTS.

[FILED DECEMBER 16, 1892.]

1. **Homestead: MORTGAGE.** A mortgage of the homestead of married persons in this state is of no validity as against the homestead right unless signed and acknowledged by both husband and wife.

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| 85 | 829 |
| 86 | 351 |
| 35 | 829 |
| 51 | 26 |
| 52 | 61 |

Whitlock v. Gosson.

2. ———: **INSANE WIFE: VALIDITY OF MORTGAGE EXECUTED BY HUSBAND.** G., the head of a family consisting of himself and three children, but having an insane wife in another state, mortgaged the family homestead, which was exempt under the laws of this state. *Held*, That the mortgage is void as to the homestead right.
3. ———: ———: ———: **FORECLOSURE: ESTOPPEL.** The mortgage in such case being void for want of power to incumber the homestead, neither the husband nor wife will be thereby estopped to deny its validity in a foreclosure proceeding by the mortgagee.
4. ———: **MORTGAGE: FORECLOSURE.** Where the answer in an action of foreclosure puts in issue the validity of the mortgage on the ground that the property in question is exempt as a homestead, and the defendants, husband and wife, did not join in its execution, a decree will not be allowed for the sale of so much of the homestead as exceeds \$2,000 in value, unless the value of the property is alleged by the plaintiff or put in issue by proper pleadings.

APPEAL from the district court for Madison county.
Heard below before **POWERS, J.**

Allen, Robinson & Reed, for appellants:

Mortgages or conveyances of the homestead without the signature and acknowledgment of both husband and wife are void. (*Swift v. Dewey*, 20 Neb., 107; *Larson v. Butts*, 22 Id., 370; *Betts v. Sims*, 25 Id., 166; *Aultman v. Jenkins*, 19 Id., 209; *McCreery v. Schaffer*, 26 Id., 173; *Stinson v. Richardson*, 44 Ia., 375; *Howell v. M' Crie*, 14 Pac. Rep. [Kan.], 260.) A deed or mortgage made in violation of statute, or with reference to a prohibited transaction, is void and will not work an estoppel. (*Mason v. Mason*, 140 Mass., 63; *James v. Wilder*, 25 Minn., 305; *Shedlin v. Whelen*, 41 Wis., 88; *Dunlap v. Thomas*, 28 N. W. Rep. [Ia.], 638; *Merriam v. Boston*, 117 Mass., 241.) The mortgage in this case being in violation of statute is void, and does not estop either Gosson or his wife to deny its validity in a foreclosure proceeding. (*Hall v. Loomis*, 30 N.

W. Rep. [Mich.], 374; *Myrick v. Bill*, 37 Id. [Dak.], 369; *Conway v. Elgin*, 38 Id. [Minn.], 370; *McClure v. Braniff*, 39 Id. [Ia.], 171; *Herron v. Knapp*, 40 Id. [Wis.], 149; *Bank v. Dickinson*, 10 S. E. Rep. [Ga.], 446; *Timothy v. Chambers*, 11 Id. [Ga.], 598; *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 23 Pac. Rep. [Kan.], 630.) The domicile of the wife follows that of the husband. (Jacobs, Domicile, sec. 214; *Republic v. Young*, Dallam [Tex.], 464; *Russell v. Randolph*, 11 Tex., 460; *Lacey v. Clements*, 36 Id., 661; *Johnston v. Turner*, 29 Ark., 280; *Burlen v. Shannon*, 115 Mass., 438.) The fact that the wife does not live with her husband on the homestead does not destroy her homestead interest in the premises. (*Larson v. Butts*, 22 Neb., 370; *Herron v. Knapp*, 40 N. W. Rep. [Wis.], 149; *Sherrid v. Southwick*, 5 N. W. Rep. [Mich.], 1027; Schouler, Dom. Rel., 54; Story's Conflict of Law, 40, 41; 9 Am. & Eng. Ency. Law, p. 812, sec. 4.)

Barnes & Tyler, contra.

POST, J.

There is in this case one question which, according to our conclusion, is decisive of the controversy, viz., the effect of a mortgage by a husband, the head of a family, upon the homestead in this state, having at the time an insane wife in another state. From the pleadings and proofs it appears that the defendant William Gosson, with his three children, removed from Illinois to this state in the year 1879, and has ever since resided upon and occupied the premises in controversy as a homestead, his family in this state consisting of his three children, whose ages do not appear, and a housekeeper. At the time of his removal to this state the defendant had a wife, Margaret Gosson, who was and still is insane and an inmate of an asylum for the insane in the state of Illinois, and who is still the wife of said defendant. It further appears that said Margaret Gos-

Whitlock v. Gomon.

son has never resided upon the premises and never acquired an actual residence in this state. It has been repeatedly held by this court that mortgages or conveyances of the homestead are void unless signed and acknowledged by both husband and wife. (*Aultman v. Jenkins*, 19 Neb. 209; *Swift v. Dewey*, 20 Id., 107; *Larson v. Butts*, 22 Id., 370; *Betts v. Sims*, 25 Id., 166; *McCreery v. Schaffer*, 26 Id., 175.) The rule is also well settled by the decisions of this and other courts, that a wife who is living separate and apart from her husband will not from that fact alone be held to have abandoned or forfeited her interest in the homestead. (*Larson v. Butts*, *supra*; *Herron v. Knapp*, 72 Wis., 553; *Castlebury v. Maynard*, 95 N. Car., 281.) The pertinent inquiry, therefore, is, whether the rule stated applies to the case under consideration. We are clearly of the opinion that it does, both upon reason and authority. The authorities are not harmonious on the question of the rights of a wife with respect to the homestead after a voluntary abandonment of the family without cause, although the decisions under statutes similar to ours are uniform to the effect that the mere absence of the wife from the state, through no fault of her own, will not be construed as an abandonment of the homestead so as to authorize a conveyance or incumbrance thereof by the husband alone. (*Chambers v. Cox*, 23 Kan., 393; *Ott v. Sprague*, 27 Id., 620; *Alexander v. Vennum*, 61 Ia., 160; *Sherrid v. Southwick*, 43 Mich., 515.)

In *Alexander v. Vennum*, A. recovered judgment against M., the owner of a homestead in Iowa. The latter conveyed to V., the defendant, his insane wife joining in the execution and acknowledgment of the deed, and immediately thereafter abandoned the property as a homestead. It was held that the conveyance by M. was void, on account of the insanity of his wife, and that a sheriff's deed to A. in pursuance of an execution sale to satisfy the judgment in his favor passed the title to the property.

The statutory provision for the conveyance or incum-

brance of the homestead is exclusive. The language is, "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife. Had Mrs. Gosson, defendant's wife, been in fact a resident of this state and her domicile the premises in controversy, it is plain that she would have been incapable of relinquishing her homestead right, and a mortgage executed by her would have been ineffectual for the purpose of creating a lien thereon. And it requires no argument to prove that on account of her absence from the state she could accomplish by indirection that which she was incapable of doing by her voluntary act.

2. It is contended, however, that the defendant William Gosson is now estopped to claim the property as a homestead by reason of having represented himself to be a single man. He is in the mortgage described as a single man, and it is alleged that the credit represented by the mortgage was given on the faith of his statement to that effect. Defendant on the other hand denies that he ever represented to plaintiff that he was a single man and alleges that the latter accepted the mortgage with full knowledge of all the facts. The evidence upon that issue is conflicting and does not call for an examination here. Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or incumbrance of the family homestead by the husband alone void not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead right as against the grantee or mortgagee. Such is the view sanctioned by the clear weight of authority and supported by the soundest reasoning. (*Connor v. McMurray*, 2 Allen [Mass.], 202; *Barton*

Whitlock v. Gosson.

v. Drake, 21 Minn., 299; *Alt v. Banholzer*, 39 Id., 511; *Crim v. Nelms*, 78 Ala., 604; *Morris v. Ward*, 5 Kan., 239; *Ayers v. Probasco*, 14 Id., 190; *Hait v. Houle*, 19 Wis., 475; *Bruner v. Bateman*, 66 Ia., 488; *Dye v. Mann*, 10 Mich., 291; *Sears v. Dixon*, 33 Cal., 326; *Green v. Marks*, 25 Ill., 221; Thompson on Homesteads and Exemptions, 474; Smith on Homesteads and Exemptions.) To hold that such a conveyance could be enforced as against the husband while void as to the wife and children, would be not only absurd in the extreme, but would be a flagrant usurpation of legislative powers.

3. The decree of foreclosure is defended by counsel for appellee on the ground that the property in question exceeds \$2,000 in value, and that the mortgage is valid as to the excess over and above that amount. The value of the homestead is, we think, under the issues in this case wholly immaterial. It is not doubted that in a proper proceeding the homestead property in excess of the statutory limit may be subjected to the satisfaction of a mortgage by the husband. But if such relief is sought it should be by pleadings which put in issue the value of the homestead. The case of *Swift v. Dewey*, 20 Neb., 107, was in a proceeding in the nature of a creditor's bill and is therefore not in point. (See *Black v. Lusk*, 69 Ill., 74; Thompson on Homesteads and Exemptions, 481.) We think, however, that the claim of appellee with respect to the value of the property is not sustained by the evidence in the record. The present value of the homestead, according to the preponderance of the evidence, is between \$1,800 and \$2,000, certainly not to exceed the amount last named. The decree of foreclosure will be reversed and the cause remanded to the district court with directions to enter judgment for the plaintiff for the amount of the notes introduced in evidence.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JAMES DAILEY, APPELLEE, V. CATHERINE KINSLER,
APPELLANT, ET AL.

[FILED DECEMBER 16, 1892.]

1. **Bona Fide Purchaser of Real Estate: NOTICE: PLEADING.** A defendant who claims protection as a *bona fide* purchaser of real estate without notice of the plaintiff's equities is required to deny such notice, although not alleged in the petition.
2. **Real Estate: PAROL TRUSTS: STATUTE OF FRAUDS: PLEADING.** Where, in an action to set aside certain conveyances through which the defendant claims title to lands, a court of equity has entered final decree in accordance with the prayer of the petition and quieting the title of the plaintiff, the latter may plead the statute of frauds in a subsequent action by the grantor of the defendant to establish a parol trust claimed to have been created in his favor at the time of the conveyance by him to the defendant.
3. ———: ———: ———: ———: **CASE STATED.** In an action by D. against F., the holder of the legal title to the land in dispute, to set aside certain conveyances through which the latter claimed title, a final decree was entered for the plaintiff in accordance with the prayer of his petition, which decree still remains in force. Subsequently K., F.'s grantor, intervened and filed an answer in which it was alleged that the deed to F. was without consideration, and executed and delivered in accordance with a contemporaneous verbal agreement by which F. was to reconvey to K. on demand of the latter. *Held*, That D. may plead the statute of frauds as a defense against K., although F. may be willing to recognize the trust.
4. **Evidence examined, and held**, not to establish a trust in parol.

REHEARING of case reported in 31 Neb., 340.

Mahoney, Minahan & Smyth, for appellant.

Switzler & McIntosh, contra.

POST, J.

This is an appeal by the defendant Catherine Kinsler from a decree of the district court of Douglas county.

Dailey v. Kinsler.

Judgment was entered at the January, 1891, term affirming the decree below. (See *Dailey v. Kinsler*, 31 Neb., 340.) Subsequently, however, on the motion of the appellant, a rehearing was allowed. The reliance of the appellant at this time is upon two propositions, viz.:

First—That the original petition did not state a cause of action against Feeney, her co-defendant, hence the question of title in him to the property in controversy was not concluded by the decree of the district court.

Second—There is no such privity between the plaintiff and Feeney in relation to said property as will entitle the former to avail himself of the provisions of the statute of frauds as against her; that the right to interpose the statute is personal to Feeney, and since he is willing to recognize the alleged trust in her favor, the plaintiff should not be heard to complain.

The record shows that the decree against Feeney was by default. Such a judgment or decree is conclusive as to the cause of action alleged only. By a failure to answer, a defendant does not confess the allegations of a petition which fails to state a cause of action. This is an elementary rule of pleading. The particular objection to the petition in this case is that it is not therein distinctly charged that Feeney had notice of the alleged equities of the plaintiff at the time he took the deed for the property. The allegation of the petition is as follows: "Said James H. Feeney claims to own said property at this time by virtue of a deed from said defendant, Catherine Kinsler, under date of May 2, 1884, which said conveyance came to plaintiff's knowledge only on May 8, 1884, and it was made without any consent on his part." The petition also contains a prayer for general relief and for the quieting of the plaintiff's title as against both defendants. The plaintiff was not required to anticipate a defense by Feeney on the ground that he was a *bona fide* purchaser. As said by Chancellor Walworth in *Lowry v. Tew*, 3 Barb. Ch. [N. Y.],

Dalley v. Kinsler.

414, "It is a general rule of equity pleading that a defendant who claims protection as a *bona fide* purchaser without notice must deny such notice, although not distinctly alleged in the bill." And in *Denning v. Smith*, 3 Johns. Ch. [N. Y.], 345, it is said that "The pleader must deny fully, in the most precise terms, every circumstance from which notice could be inferred." (See also *Manhattan Co. v. Evertson*, 6 Paige Ch. [N. Y.], 457; *Harris v. Fiy*, 7 Id., 421; *Bowman v. Griffith*, 35 Neb., 361.) It is evident that the petition stated a cause of action against Feeney, and if he claimed the rights of a *bona fide* purchaser, he was bound to allege and prove purchase in good faith without notice of the equities of the plaintiff.

2. In determining whether the statute of frauds is available to the plaintiff in this case, the fact should not be overlooked that both the appellant, Miss Kinsler, and Feeney, her grantee, were, at the inception of this controversy, joined as defendants. The former was served by publication and the latter personally. Both were defaulted and a decree entered quieting the plaintiff's title and perpetually enjoining both defendants from in any way conveying or incumbering the property. That decree was, on the motion of the appellant, set aside as to her, but continues in full force and effect as to Feeney, who afterward, regardless of the injunction, conveyed the property to the appellant. An answer was subsequently filed by the appellant, in which, after denying the allegations of the petition, she alleged that she was the equitable owner of the property, and that the deed to Feeney was executed with the distinct understanding that the latter would reconvey the property to her upon demand. It appears from the evidence in the bill of exceptions that there was no written agreement by Feeney to reconvey. Nor is it even contended that the alleged trust could have been enforced by the appellant as against him. Did the plaintiff, by virtue of the decree, succeed to the rights of Feeney, so that he may now inter-

Dalley v. Kinsler.

pose the plea of the statute to defeat the alleged trust in favor of the appellant? It should be noted in this connection that the decree does not in terms command a conveyance by Feeney to plaintiff. But that omission we regard as unimportant. It is in all other respects in the usual form and clearly sufficient to bind the defendant therein and all who are in privity with him in respect to the property affected thereby. (Wells, *Res Adjudicata*, 28; *Adams v. Barnes*, 17 Mass., 365; *Kelly v. Donlin*, 70 Ill., 386.)

It was held in *Rickards v. Cunningham*, 10 Neb., 417, and *Hansen v. Berthelsen*, 19 Id., 433, that the defense of the statute of frauds is personal, and available only to the party sought to be charged and those in privity with him. This we understand to be the rule generally accepted by courts in giving effect to the provisions of the statute. The term privity denotes mutual or successive relationship to the same rights of property. (1 Greenleaf on Ev., 198.) By the decree in his favor the plaintiff must be held to have succeeded to the rights of Feeney, whatever they may have been, in the property in controversy. As said by Judge Day in *McDonald v. Gregory*, 41 Ia., 516: "If the rights of two parties have been determined respecting a particular subject and the subject-matter of the suit is afterwards assigned, the assignee takes it affected by the prior adjudication and may avail himself of its advantages and is subject to its burdens." *Rickards v. Cunningham* and *Hansen v. Berthelsen* are not in conflict with the view here expressed. The point decided in the first named case is, that an execution plaintiff cannot defeat a sale of personal property by the defendants to a third party on the sole ground that such sale is in violation of the provisions of the ninth section of the statute of frauds, and in the last named case the only question discussed or decided was whether the grantee on the facts in that case could plead the statute as a defense. The decision, both in the district

Dailey v. Kinsler.

court and in this court, was upon the ground that the grantee of Berthelsen took with notice of the plaintiff's rights. The question of the application of the statute was not necessarily involved, and whether the grantee could in such a case interpose the statute for his protection is a question not raised in this controversy, and on which the writer does not wish to be understood as expressing an opinion.

3. There is a failure of proof on the part of the appellant to sustain the allegations of a trust in her favor. The conveyance to Feeney appears to have been voluntary on her part, unaccompanied by any promise to reconvey or understanding to that effect. She is asked, while testifying in her own behalf, how she came to execute the deed to Feeney, to which she answered, "I was sick and thought I was going to die at the time, and I wanted to have some money to bury me, and that is the reason I gave the deed at that time, but I didn't go away; I was sick and didn't expect to get well, and I made the deed for money enough to bury me out of it." Again, on redirect examination, she is asked to state whether or not there was any understanding between herself and Feeney, at the time the deed was executed, with respect to a reconveyance of the property, to which she answered, "When I made the deed to Mr. Feeney I had no idea of anything at all, only that I made it on the conditions I spoke of." This evidence does not prove an agreement to reconvey and is clearly insufficient to establish a trust. The decree of the district court is right, therefore, and is

AFFIRMED.

THE other judges concur.

GEORGE BETTS ET AL. V. F. L. SIMS.

[FILED DECEMBER 16, 1892.]

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1. **Real Estate: PAYMENT OF MORTGAGE BY PURCHASER: FAILURE OF TITLE: SUBROGATION.** A purchaser of real estate who has paid off a prior mortgage thereon in the belief that he was the owner of the property purchased, will, on a failure of his title, be subrogated to the rights of the mortgagee as against the mortgagor and others who are in equity liable for the mortgage debt.
2. ———: ———: ———. In an action by the plaintiffs, husband and wife, to quiet the title to their homestead against the defendant who claimed title through a conveyance executed by the husband alone, it was disclosed that B., who held title through the deed mentioned, at the request of plaintiffs, mortgaged the premises to a third party, and with the proceeds thereof paid and satisfied two prior mortgages thereon executed by both plaintiffs; and that the defendant, who held by certain *mesne* conveyances from B., believing himself to be the owner, paid off the mortgage executed by the latter. *Held*, That defendant should be subrogated to the rights of the several mortgagees and is entitled to a decree of foreclosure in the action to quiet title.
3. ———: CONVEYANCE OF HOMESTEAD: PURCHASE OF APPARENT TITLE AT REQUEST OF REAL OWNERS: RIGHT OF PURCHASER TO RECOVER PURCHASE MONEY: SET-OFF. Plaintiffs, husband and wife, induced P., defendant's grantor, to purchase real estate from B., who held the apparent title thereto, for their benefit, and at their request, agreeing to purchase a part thereof from him at the price paid B., as soon as they could raise the necessary funds. P. accordingly purchased the property from B. for \$1,000 in money and assumed a prior mortgage thereon amounting to \$1,150, for which plaintiffs were liable. Plaintiffs subsequently brought an action to quiet their title to the same property against the defendant on the ground that it was their homestead, and a conveyance through which both B. and P. must trace title was executed by the husband only. *Held*, On the facts found, that the \$1,000 paid by P. for the land should in equity be treated as an advancement by him for the benefit of plaintiffs, and that defendant, P.'s assignee, was entitled to offset that amount, with interest, against the claim of plaintiffs for rents and waste.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Hall, McCulloch & English, for plaintiffs in error.

Robert Ryan, contra.

POST, J.

This controversy had its inception in an action by the plaintiffs in error in the district court of Saline county to quiet their title to the property in controversy, to-wit, a quarter section of land in said county, as against the defendants in error. They alleged in their petition that the defendants claimed title through a deed from George Betts which was void and insufficient to pass any title whatever, for the reason that said property was at the time in question the homestead of the said George Betts and his wife Eliza, who did not sign or join in the execution thereof. The defense relied upon was an estoppel as against both plaintiffs. On a final hearing the district court dismissed the petition for want of equity and entered a decree for the defendant. An appeal was taken to this court, where the decree of the district court was reversed and judgment entered here for plaintiffs in accordance with the prayer of the petition. (See *Betts v. Sims*, 25 Neb., 166.) The facts involved in that controversy, so far as they are material to this, are fully stated in the opinion cited above. Subsequently the defendant in error made application to this court for a modification of the decree against him so as to allow him to be subrogated to the rights of Charles Bidleman, who held a mortgage on the property in controversy, and which he, defendant, had paid in full while in good faith, relying upon his title through the aforesaid deed from George Betts. Said application was granted, but it appearing that an accounting would be necessary in order to fully determine the rights of the parties with respect to

Betts v. Sims.

said claim, the case was remanded to the district court for hearing upon amended pleadings. It is not deemed necessary to make an extended reference to the pleadings, as the findings and decree of the district court, which are set out below, are responsive to all the issues presented, and plainly indicate the contentions of the parties at the hearing. The findings and decree are as follows:

"And now on this 24th day of November, 1890, the same being a portion of the October term of this court, this cause came on to be decided upon the submission heretofore had of said cause, and the court, being now fully advised in the premises, finds that the findings of fact heretofore made by this court are, and each of them is, fully sustained by the evidence submitted upon this hearing. This court further finds that the defendant F. L. Sims, believing in good faith that he was the owner at the time of the southeast quarter (S. E. $\frac{1}{4}$) of section eight (8), in township eight (8) north, range one (1) east, sixth (6) principal meridian, did, on the 4th day of March, 1883, pay off the amount due on a certain mortgage made on said premises by Joseph Brown to Charles Bidleman of date September 1, 1880, which said mortgage was duly filed for record in the office of the county clerk of Saline county, Nebraska, on September 24, 1880, and duly recorded in Mortgage Record No. 11, on pages 388 and 389 of said office. That said mortgage was made with the knowledge and assent and at the request of George Betts and Eliza Betts, and the proceeds were used for their benefit, and in making said mortgage the court finds that Joseph Brown was acting as the trustee of said George Betts and Eliza Betts. * * * That the amount so paid on March 4, 1883, by F. L. Sims was eleven hundred and fifty dollars, with eight per centum per annum interest thereon from the preceding 1st day of September, which interest so paid was in amount fifty-seven dollars, and that the said F. L. Sims is entitled to be subrogated as to said

mortgage and its lien, enforcement, and remedies in respect thereto to all the rights which the said Charles Bidleman could now assert if he held said mortgage unpaid and undischarged. The court therefore finds that F. L. Sims, as to said premises above described, is entitled to the relief by him prayed, and the foreclosure of said mortgage, as though in form assigned by Charles Bidleman to said F. L. Sims, and to an order of sale, under which said premises shall be sold to pay the amount above found due, to-wit, the sum of eleven hundred and ninety-seven dollars, with interest thereon at eight per centum per annum to the present date, in all to this date the sum for which F. L. Sims is entitled to the relief as aforesaid is nineteen hundred and thirty-six $\frac{45}{100}$ dollars, to draw eight per centum interest per annum from this date. The court further finds that the said premises were conveyed by F. M. Patton to F. L. Sims with all his right, title, interest, claim that he held against George Betts and Eliza Betts and Joseph Brown as to the lands above described; that said George Betts and Eliza Betts requested, urged, and induced said F. M. Patten to purchase said premises from Joseph Brown and as part consideration to pay, and the said Patton did therefore pay, to said Brown for the use and benefit of, and upon the direction of, George Betts and Eliza Betts the sum of one thousand dollars (\$1,000) cash, and assuming the mortgage to Charles Bidleman for \$1,150; that said one thousand dollars was paid as aforesaid September 7, 1882, by F. M. Patton, and that as to the said sum of one thousand dollars F. L. Sims is entitled to be subrogated to the rights of his grantor, F. M. Patton, and to have computed interest thereon at the rate of seven per centum per annum, which sum of one thousand dollars and interest should be credited upon the amount found due in favor of George Betts and Eliza Betts as hereinafter stated. The court finds further that the said F. L. Sims should account for the rental value of the above premises from the time he took possession of the

Betts v. Sims.

same until dispossessed by the decree of the supreme court, a period of six years, at the rate of one $\frac{15}{100}$ dollars per acre per year, or in all one hundred and eighty-four dollars per year, said rent being due at the end of each year, and to draw seven per centum interest from the said times, and the said Sims should also account for the granary removed from said premises at its fair value, which the court find, to be one hundred dollars, and for the stable removed, at its fair value, which this court finds to be ten dollars, and for the value of all trees removed from said premises, twenty-two $\frac{25}{100}$ dollars, and the court, being without reliable data upon which to figure the time for which Sims should pay interest on the three items last mentioned, assumes that it should be for three years at seven per centum per annum, which amounts to twenty-seven $\frac{37}{100}$ dollars. The court further finds that the above named amounts (excluding the Bidleman mortgage) with seven per centum interest thereon should be treated as a set-off as to the one thousand dollars paid by F. M. Patton as above stated, with seven per centum interest thereon from the date of said payment, which was on September 7, 1882; that upon that basis the court finds that the said one thousand dollars, with seven per centum interest thereon from September 7, 1882, computed thereon, exceeds the total amount for which F. L. Sims should account as aforesaid, including interest thereon as above found due, but this court finds no prayer for relief in favor of F. L. Sims as to said excess on said premises nor for reimbursement for taxes paid or improvements made by Sims, and therefore finds that any relief on that score must be denied. It is therefore ordered, adjudged, and decreed by this court that F. L. Sims be entitled to be and is subrogated to the rights of Charles Bidleman as to the southeast quarter (S. E. $\frac{1}{4}$) of section eight (8), township eight (8) north, range one (1) east, sixth principal meridian, as against George Betts and Eliza Betts and all parties claiming under or through them or either of them;

that the mortgage in favor of Charles Bidleman be declared in full force and virtue in favor of F. L. Sims by subrogation from September 1, 1880; that said mortgage be foreclosed as prayed, in favor of F. L. Sims for the amount now due thereon, which the court finds to be nineteen hundred and thirty-six $\frac{45}{100}$ dollars, to draw eight per centum per annum from this date."

The first point made in the brief of plaintiffs in error is that the order of this court modifying the decree in their favor did not include the so-called Patton claim; hence, the question whether the defendant should be subrogated to the rights of Patton with respect to money paid by the latter to Brown, his grantor, was not involved in the second hearing. It is not necessary to look to the order remanding the case for the issues, since the question of the defendant's right to offset the \$1,000 paid by Patton to Brown at the special instance and request of the plaintiffs was distinctly raised by the pleadings in the supplemental proceeding.

2. The evidence before the district court was not preserved, hence the only question now open for consideration is whether the decree is warranted by the facts as found by the court. Of the right of the defendant to be subrogated to the equities of Bidleman there can be no doubt. From the findings of the court on the first hearing, which are set out at length in the opinion previously filed in the case, and which the court in this proceeding finds to be true, it appears that in the year 1876 the plaintiffs mortgaged the land in controversy to the New England Mortgage Security Company to secure the sum of \$600, borrowed by them, which indebtedness bore interest at the rate of ten per cent, and in the year 1877 they mortgaged said land to one R. S. Bentley to secure the sum of \$500, borrowed by them, which indebtedness bore interest at the rate of twelve per cent. Both plaintiffs signed and acknowledged the said mortgages. In the year 1880 plaintiffs procured

said Bentley, to whom the land had in the meantime been deeded as security, for the \$500 loan, together with other money advanced by him, to convey said land to Joseph Brown, who assumed said mortgages as part of the consideration therefor. Brown, after the conveyance to him, mortgaged the premises to Bidleman for \$1,150, with the proceeds of which he paid off and satisfied the two mortgages executed by plaintiffs. The defendant, who subsequently purchased from Patton, Brown's grantee, paid in full and caused to be satisfied of record the mortgage to Bidleman. Plaintiffs having invoked the equitable powers of the court must, as a condition to relief, discharge the obligation which in equity they owe to the defendant. "The rights of subrogation," says Chancellor Kent, "is founded upon natural justice and is recognized in every cultivated system of jurisprudence." (*Cheesbrough v. Millard*, 1 Johns. Ch. [N. Y.], 412.) The court, therefore, did not err in awarding a decree of foreclosure for the amount of the Bidleman mortgage and interest thereon.

3. It is urged finally that the defendant was not entitled to be subrogated to the rights of Patton as to any claim for the \$1,000 paid by the latter to Brown, and that the district court erred in allowing that amount as an offset against the sum of \$1,236, found due them on account of rents and for waste by the defendant. By reference to the finding, set out above, it appears that plaintiffs requested and induced Patton to purchase the premises from Brown and to pay the \$1,000 for their benefit and by their direction. It is further found that Patton conveyed said property to the defendant "with all his right, title, interest, and claim that he held against George Betts and Eliza Betts, as to the lands above described," etc. The facts as found amount to an assignment by Patton of whatever cause of action he may have had against plaintiffs, and which is available to the defendant in this action.

The next and only remaining question is that of the lia-

bility of plaintiffs to Patton for the \$1,000 paid to Brown as part consideration for the property. By reference to the tenth finding, accompanying the original decree, it will be observed that plaintiffs were beneficially interested in the purchase of the land by Patton, that they were desirous of securing a part of the premises, but not having the necessary money, induced Patton to purchase it, agreeing to purchase a part of it from him at the price paid therefor to Brown. Construing the several findings together, it is apparent that the \$1,000 in question should in equity be treated as an advancement by Patton for plaintiffs and for their benefit, and for which they should account in this action. It is not contended that this claim could be made a lien upon the property, nor is there a prayer for judgment for the excess remaining in defendant's favor after allowing plaintiffs credit for the amount found in their favor. The claim for rents of the property and for waste committed thereon does not partake of the character of the homestead, and is not shown to be exempt on other grounds. The decree is right and is

AFFIRMED.

MAXWELL, CH. J., concurs.

NORVAL, J., not sitting.

State, ex rel. Christy, v. Stein.

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STATE OF NEBRASKA, EX REL. S. W. CHRISTY, V. HERMAN E. STEIN, COUNTY CLERK, AND L. L. JOHNSON, INTERVENOR.

[FILED DECEMBER 20, 1892.]

1. **Elections: RETURN OF POLL BOOK: CERTIFICATION.** Under the provisions of section 20, chapter 26, Compiled Statutes, it is the duty of judges and clerks of election to return a true list of the persons voting at that election and certify the same. It is also the duty of the judges and clerks to certify the aggregate number of votes cast for each person voted for, but it is no part of their duty to certify that certain persons received a specified number of votes as a democrat and a certain number as people's independent, or otherwise, and such certification has no force or effect.
2. ———: **DUTY OF COUNTY CLERK: CANVASSING RETURNS: CERTIFICATE OF ELECTION: CLASSIFICATION OF VOTES.** By section 46 of the above chapter it is made the duty of a county clerk, upon the reception of the returns from each election precinct, ward, etc., and within six days after the closing of the polls, together with two disinterested electors chosen by himself, to open the poll books and make abstracts of the votes cast * * * for members of the legislature from the county alone on one sheet, and "of votes for members of the legislature by districts comprising more than one county, on another sheet," and by section 48 the clerk is required to make out a certificate of election to the person having the highest number of votes. *Held*, That it was the duty of the clerk to issue a certificate to the person having the highest number of votes, and that he had no authority to classify the votes cast for a candidate as people's independent, democratic, or otherwise.

ORIGINAL application for *mandamus*.

L. G. Hurd, G. M. Lamberton, and A. W. Agee, for relator.

Thomas H. Matters, and John M. Ragan, contra.

MAXWELL, CH. J.

This is an application for a *mandamus* to compel the defendant Stein to issue a certificate of election to the relator.

State, ex rel. Christy, v. Stein.

The cause of action, as set forth in the amended affidavit, is as follows:

“S. W. Christy, the relator, being first duly sworn says and represents to the court, that he is a citizen of the United States, and of the state of Nebraska, and has been for more than two years last past, and continuously to the present time, a resident elector of the county of Clay, in said state, and is eligible to the office of state senator for the twenty-fifth senatorial district, in the state of Nebraska, which said senatorial district is composed of the counties of Clay and Hamilton and no others; that the respondent, Herman E. Stein, is, and has been for more than two years last past, the duly elected, qualified, and acting county clerk of the said county of Clay, which is the first county named in the law designating the said senatorial district.

“That at the general election in said senatorial district held on the 8th day of November, 1892, the relator was a candidate for the office of state senator, from said senatorial district, and that the several election boards in the several precincts in the county of Clay duly made returns to the respondent as county clerk of Clay county, Nebraska, of all the votes cast in the several voting precincts respectively, in said county including those cast for state senator for said twenty-fifth senatorial district, and that within six days after the 8th day of November, 1892, the said county clerk, together with two disinterested electors and residents in said county who were selected by him for that purpose, canvassed the votes of the several precincts in said county, which had been duly returned to him as such county clerk by the several election boards in said county, including the votes cast for state senator in said district, and made an abstract thereof as provided by law, and found that there had been cast in the several voting precincts in said county for state senator as follows:

State, ex rel. Christy, v. Stein.

For the relator, S. W. Christy1,582
 For L. L. Johnson, people's independent..... 862
 For L. L. Johnson..... 632
 For L. L. Johnson, democrat..... 280

which were all the votes cast for the office of state senator at said election in the county of Clay.

“The relator further states and shows to the court, that in the county of Hamilton the several election boards in the several voting precincts in said county duly made returns of all the votes cast at said election so held in said county on November the 8th, 1892, including the votes cast for state senator for said twenty-fifth senatorial district in said county, to the county clerk of said county, and that within six days after the said 8th day of November, 1892, L. W. Shuman, who was the duly qualified and acting county clerk of said county of Hamilton, together with two disinterested electors selected by him for that purpose, duly opened and canvassed the returns of the votes cast in said county including the votes cast for state senator in said twenty-fifth senatorial district, and made an abstract thereof as required by law, and found that the votes cast for state senator in said county were as follows, to-wit:

For the relator, S. W. Christy.....1,203 votes
 For L. L. Johnson.....1,232 votes
 For H. W. Castle..... 96 votes

“That the foregoing were all the votes cast in either of said counties for said office of state senator for said twenty-fifth senatorial district; that within six days after the holding of said election, on the 8th day of November, 1892, the county clerk of Hamilton county duly transmitted by mail to the county clerk of Clay county, Nebraska, Herman E. Stein, respondent herein, a certified copy of the abstract of all the votes cast in said county of Hamilton, for the office of state senator for said twenty-fifth senatorial district, and notwithstanding the relator herein received

State, ex rel. Christy, v. Stein.

the highest number of votes cast for any person for state senator in said senatorial district, as it appears by the returns made by the several election boards in said counties of Clay and Hamilton, composing said senatorial district, and as it appears by the canvass of votes and the abstracts thereof made by the canvassing board in said counties respectively, a copy of said abstracts, which were compared by the respondent and disinterested electors, are hereto attached marked A and B, and made part hereof, yet the said respondent, Herman E. Stein, refused, and still refuses, to issue to this relator a certificate of election to the office of state senator for the twenty-fifth senatorial district, although this relator has demanded of the said respondent that he issue to him, this relator, such certificate.

“The relator therefore prays that a peremptory writ of *mandamus* may issue, commanding the respondent, Herman E. Stein, to forthwith issue to this relator, S. W. Christy, a certificate of his election to the office of state senator for the twenty-fifth senatorial district of the state of Nebraska, composed of the counties of Clay and Hamilton, and for such other relief as the relator may be entitled to, and for costs.”

The defendant Johnson was permitted to intervene and filed an answer in which he admits the facts stated in the first, second, third, fourth, and fifth paragraphs of the affidavit except as to the abstract of the votes made by the board of canvassers. He then alleges:

“At the election held on November 8, 1892, in the twenty-fifth senatorial district, comprising the counties of Clay and Hamilton, there were three candidates for said office, to-wit, S. W. Christy, L. L. Johnson, and H. W. Castle; that L. L. Johnson was duly nominated by the people's independent party, which nomination was duly certified according to law to the county clerk of Clay county, Nebraska, and within the time prescribed by law, and no objection was made thereto; that L. L. Johnson

was also nominated by the democratic party in said district, and his nomination was duly certified to the county clerk of Clay county, Nebraska, according to law, and within the time prescribed by law, and no objection was made thereto; that the county clerk of Clay county, Nebraska, who is respondent herein, was also the chairman of the republican county central committee of Clay county, Nebraska, and of the twenty-fifth senatorial district of the state of Nebraska; that immediately preceding the election held November 8, 1892, said county clerk of Clay county, Nebraska, proceeded to and did write in the poll books as sent out by him to the various polling places in Clay county, Nebraska, the name of this answering defendant as the candidate of two different parties, and also in part of the poll books putting no political designation for the office of this answering defendant, and in all of the poll books sent out by him he placed no political designation after the name of the relator of this action; that within the time prescribed by law L. L. Shuman, who was the duly qualified and acting county clerk of Hamilton county, Nebraska, together with two disinterested persons, being freeholders, selected by him for that purpose, duly opened and canvassed the returns of the votes cast in said county, including the votes cast for said state senator in the twenty-fifth senatorial district, and made an abstract thereof as required by law, and duly certified the same to the county clerk of Clay county, Nebraska; that within the time prescribed by law the votes as cast at the general election held in Clay county on the 8th of November, 1892, were returned to the county clerk of Clay county, Nebraska, and within the time prescribed by law the clerk selected two disinterested persons, being freeholders, who, together with the county clerk of Clay county, Nebraska, comprised the board of canvassers of said county, and on the 14th day of November, 1892, said board canvassed the vote of said county of Clay and state of Nebraska, and made the fol-

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lowing abstract of election in relation to the matter now before this court:

“ ‘ABSTRACT OF ELECTION.

“ ‘*Abstract of Votes Cast in Clay and Hamilton Counties, Nebraska, at the General Election, held on Tuesday, the eighth day of November, 1892.*

“ ‘For the office of senator twenty-fifth district there were fifty-eight hundred eighty-eight votes cast, which were cast for the persons as stated in the following schedule, to-wit:

“ ‘Name of office, senator twenty-fifth district.

“ ‘Names of persons, number of votes cast for each. Figures voted for: S. W. Christy, 2,785; H. W. Castle, 96; Mart Castle, 1; L. L. Johnson, 1,864; L. L. Johnson (people’s independent), 862; L. L. Johnson (democrat), 280.’

“ ‘That on the 14th day of November, 1892, the board of canvassers made full return of their acts and doings in relation to the matter hereinbefore set forth and declared the result of their computation in words and figures following, to-wit:

“ ‘We, the undersigned, H. E. Stein, county clerk of said county, and W. A. Ward and J. E. Wheeler, two disinterested householders of the county, chosen by the said county clerk, acting as a board of county canvassers for said county, do hereby certify that the foregoing is a correct abstract of the votes cast at the aforesaid election according to the poll books returned from the several precincts in said county. We further certify that at the said election the following persons were duly elected to the office stated opposite their respective names:

| NAMES OF PERSONS ELECTED. | NAME OF OFFICE. |
|---------------------------|-----------------------------------|
| L. L. Johnson | Senator 25th Senatorial District. |

“ ‘In testimony whereof we have hereunto set our hands

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and caused this to be attested by the seal of said county, this 14th day of November, 1892.

“ ‘[SEAL.]

H. E. STEIN,

“ ‘W. A. WARD,

“ ‘J. E. WHEELER,

“ ‘*Canvassers.*’

“That according to the returns of the canvassing board of Clay county, Nebraska, as hereinbefore set forth, L. L. Johnson received 3,006 votes, and S. W. Christy 2,785 votes, and H. W. Castle 96 votes; that after the returns were made, as herein set forth, and canvassed by the board of canvassers of Clay county, Nebraska, and the result declared by them as above set forth, the county clerk of Clay county, Nebraska, refused to issue to this defendant a certificate of election according to law, and on the 15th of November, 1892, this answering defendant served notice upon the county clerk of Clay county, Nebraska, that he would appear before the district court of Clay county, Nebraska, then in session at Clay Center, Nebraska, the county seat of said county, on the 16th day of November, 1892, at 9 o'clock A. M. of said day, and ask for a peremptory writ of *mandamus* to issue, compelling the county clerk, the respondent herein, to issue to this answering defendant a certificate of election according to law. On said 16th day of November, 1892, this defendant appeared before said court and presented said cause to said court. The respondent in this action, also being the respondent in that action, appeared before said court personally and with his attorneys, Hon. S. W. Christy (who is the relator herein and while appearing on the face of the record for Stein, in truth and in fact he appeared in said action for himself), Hon. L. G. Hurd, and Hon. George W. Bemis, who are the attorneys for the relator in this action, and resisted said application before said court, and the court thereupon, after full consideration of the same, issued an alternative writ of *mandamus*, set forth in the respondent's answer in this mat-

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ter, returnable on the 17th day of November, 1892, at 9 o'clock A. M. of said day."

A copy of the sample ballot is set out in the answer of the defendant Stein.

Section 20 of chapter 26, Compiled Statutes, is as follows: "The county clerk, previous to the opening of the polls, shall prepare duplicate poll books, in the manner and form following:

"Poll books of an election held in _____ precinct, _____ township, or _____ ward, in _____ county, on the _____ day of _____, A. D. _____, at which time A. B., C. D., and E. F. were judges, and G. H. and I. K. were clerks of said election—the following named persons voted thereat:

"NUMBER AND NAMES OF ELECTORS.

| | | | |
|--------|-------|--------|-------|
| No. 1. | A. B. | No. 3. | E. F. |
| No. 2. | C. D. | No. 4. | G. H. |

"We do hereby certify that the above is a true list of the persons voting at the above named election.

"Attest:

"A. B.,

"C. D.,

"E. F.,

"Judges of Election.

G. H.,

I. K.,

Clerks.

"TALLY LIST OF PERSONS VOTED FOR, AND FOR WHAT OFFICE, CONTAINING THE NUMBER OF VOTES FOR EACH CANDIDATE.

| | | | |
|-----------|---------------------|---------------|--|
| Governor. | Member of Congress. | County Clerk. | |
|-----------|---------------------|---------------|--|

"We hereby certify that A. B. had _____ votes for governor, and C. D. had _____ votes for governor; that E. F. had _____ votes for member of congress, etc.

"Attest:

"A. B.,

"C. D.,

"E. F.,

"Judges of Election.

G. H.,

I. K.

Clerks."

Section 46 provides that the county clerk, within six days after the closing of the polls, together with two disinterested electors of the county, to be chosen by himself, shall open the poll books and from the returns therein shall make abstracts of the votes in the following manner: Of votes for governor, etc., on one sheet. Of votes for presidential electors, on another sheet. Of votes for members of the legislature from the county alone, on another sheet. Of votes for members of the legislature by districts, comprising more than one county, on another sheet, etc.

Section 48 requires the clerk to issue a certificate of election to the person having the highest number of votes for the several county and legislative offices.

It will thus be seen that it is the duty of the several election boards to send to the county clerk a true list of the names of persons voting at the election over which they presided, and to add up the votes cast for the several persons voted for and certify the same to the county clerk. Such board has no more authority to certify the politics of the persons voted for than it would have to certify the color of the hair or eyes of the several candidates or their height, weight, or other immaterial facts. Nor has such certification any force or effect whatever. Neither had the board of canvassers of the county any right or authority to separate the votes cast for the same candidate as a democrat, people's independent, or without any designation. It was their duty to add the whole number of votes cast for each candidate and declare the result, and it is the duty of the clerk to issue a certificate of election to the person having the highest number of votes.

Considerable stress is laid upon the want of authority of the board to declare the result—as though such declaration was, in effect, a judgment. Whatever the rule may be in other states it has never had that effect here; and a declaration in favor of a party while the votes showed

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that he had not received the highest number of votes cast for that office would be unavailing. The declaration in this state has never amounted to more than a proclamation of the result of the election. The proclamation in this case showed that the board of canvassers, after adding the votes together in favor of the defendant and the other candidates, found that the defendant Johnson had 3,006 votes in the district, while the relator, his most prominent competitor, had but 2,785, and these figures are admitted to be correct. This would seem to settle the controversy in favor of the defendant.

Considerable stress is laid upon the Australian ballot law of this state, as though it was a scheme to put voters in a strait-jacket and compel them to vote for the candidate of one party alone. The title of the law is, "An act to promote the independence of voters at public elections; to enforce the secrecy of the ballot, and to provide for the printing and distribution of ballots at public expense." The first section provides that printing ballots and cards of instruction at all elections for public officers, shall be at the expense of the county, etc. Section 2 provides for the nomination of candidates. Section 3 provides for certifying said nominations. Section 5 provides for nominating by petition. Section 6 prohibits certifying the nomination of two persons by any nominating body where but one person was to be elected. Section 7 requires the preservation of certificates for two years. Section 8 provides when the certificates shall be filed. Section 9 requires the secretary of state to certify to certain nominations to the county clerk of each county. Section 10 provides the mode of declining a nomination. Section 11 provides for filing objections to certificates of nomination, and declares in case no objection is made, that the officer with whom the original certificate was filed shall in the first instance pass upon the validity of such objection and his decision shall be final unless an order shall be made by a court or

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judge having jurisdiction. Section 12 provides for filling the vacancy in case of the death of a nominee, etc. Section 13 requires the use of official ballots upon which shall be printed the name of every candidate whose name has been certified. Section 14 provides for "sample ballots printed upon red or green paper, but in the form of those to be used on election day, each containing the names of the candidates. Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of president and vice president of the United States presented in one certificate of nominations shall be arranged in a separate group. Every ballot shall also contain the name of the party or principle which the candidates represent as contained in the certificates of nomination. At the end of the list of candidates for each office shall be left a blank space large enough to contain as many written names of candidates as there are offices to be filled. There shall be a margin on each side at least half an inch wide, and a reasonable space between the names to be printed thereon, so that the voter may clearly indicate, in the way hereinafter provided, the candidate or candidates for whom he wishes to cast his ballot." Section 15 requires the county clerk to print and provide for said election precinct or district before the election a certain number of ballots. Section 16 provides for correcting errors or omissions in the ballots. Section 17 requires the county clerk to cause to be delivered to one of the judges of each election precinct the proper number of ballots as provided in section 15. Section 18 provides for election districts and booths, the general form of the latter, their location, and the manner in which voters shall enter and use the same. Section 19 pro-

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vides for two additional judges to deliver ballots to the voters for preparation. Section 20 provides that the voter shall designate his choice of candidates by placing a × opposite the name of the one selected. These crosses must be made on ballots furnished by the county clerk in pursuance of the provisions heretofore stated, and upon which two members of the election board shall first write their names in ink on the back of the ballot. The remaining sections relate more particularly to securing the rights of voters and a free and unobstructed right to exercise the elective franchise.

The object of the law is "to promote the independence of voters at public elections." This is effected by placing all the nominees of all the parties and those nominated by petition before the voter on one ticket, and requiring him to designate the person for whom he votes by a cross opposite such name. No name printed on the ballot is to be counted unless a cross is placed opposite to it. If a person receive a nomination from more than one party it would seem proper to place his name with the nominees of each party. This would not entitle a voter to vote more than once for a particular person. Suppose a candidate is known to be a fair-minded man of integrity and ability and he should receive a nomination from the republican and democratic parties, he would be the nominee of each and should, in the opinion of the writer, be placed on the ballot as the nominee of each of said parties. The object of requiring the designation of the party making the nomination is not to build up any particular party, but to prevent deception by making it appear to voters that a certain person was the nominee of a party when in fact he was not. Besides, this question cannot be considered at this time. The certificates of nomination were properly made and settled and the sample ballots prepared and submitted before the election, and seem to have conformed in all respects to the requirements of the law. This question will be further considered under the second subdivision.

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Second—It will be observed from the synopsis of the several sections of the statute above given that the county clerk is to place the names of all persons nominated in any of the modes provided on the sample ballots, and that they shall be in possession of the clerk and open to public inspection at least six days before the election. This sample ballot is to be in the form of the official ballots. If the sample ballot is unsatisfactory to any one party the law provides a summary remedy for its correction.

In the answer of Mr. Stein it appears that he placed the name of L. L. Johnson at first in but one place in the sample ballot; that the chairman and secretary of the democratic county central committee and the same officers of the people's independent county central committee protested against this form and insisted that as two nominations had been made by distinct parties that each party was entitled to have its nominees placed separately on the ballots. They also notified him that unless the error was corrected they would apply to the proper tribunal for redress. Stein at first refused to make the correction on the ground it would not be legal, but after consulting eminent counsel he sent the officers above named the following letter:

“CLAY CENTER, Oct. 29, 1892.

“*Hon. N. M. Graham, Chairman, and Geo. A. Shike, Secretary, People's Independent Party.*

“GENTLEMEN: Upon the receipt of your favor of the 25th inst., requesting that the official ballot to be used at the coming election to be held November 8, 1892, be printed in a form suggested by you different than from that intended by me, and being anxious to do exact justice and comply with the law, I offered to submit the question to the supreme court for its decision, and upon your refusal, and you having employed the county attorney, whose duty it is to advise me in regard to my official duties, I immediately took the train to Lincoln and submitted the question to able counsel in that city so as to get a disinterested, un-

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biased opinion, and he being of the opinion that either the form suggested by you, or the one intended by myself, would be legal, and you representing different parties from myself, and rather than appear to be taking an advantage of a political opponent by reason of my official position, and having just returned home this morning and take this method of informing you that I have concluded to grant your request and print the ballots as you suggest.

“Yours truly,

H. E. STEIN,

“County Clerk.”

That is, that the defendant Stein, having consulted able counsel, was advised that the ballots as he was requested to make them would be valid, and therefore he framed them as desired. Thus, all parties, after examining the statute and consulting learned attorneys, came to the conclusion that the form of the ballot here used was the proper one, and acted honestly in that belief. That was their construction of the statute and no doubt was correct. If no objection is made to the form in which names on the ballots are submitted, or if made, decided, and such ballots are used at the election, it will be too late thereafter to raise the objection, provided all the names certified to the clerk were placed upon the sample and official ballots. There is no complaint on the latter ground and it is now too late to raise objections to the *form* of the ballots.

In the original affidavit filed by the relator in this court on November 14, 1892, which is part of the files, we find the following allegations:

“That your relator was the nominee of the republican party regularly nominated and whose name regularly appeared on the official ballots as the republican candidate, which were prepared and used by the voters at said election in said district; that L. L. Johnson, a citizen and resident of said county and district, was also a candidate for said office of state senator in said district and was nominated for said position by the people’s independent party

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and was also nominated for said office by the democratic party of said district; that the defendant Herman E. Stein, whose duty it is by law to prepare the ballots used by the voters in said county for said office at said election, prepared said ballot intending to have the same used in the following form :

SENATORIAL.

| For Senator 25th District. | Vote for one. |
|----------------------------|--------------------------------------|
| S. W. Christy..... | Republican. \| |
| L. L. Johnson..... | { Democrat. People's Independent. \| |

Placing the name of said Johnson on said ballot in but one place and followed by the words democrat—people's independent. But upon the written demand of said Johnson and the chairman of the county central committee of both the people's independent and democratic parties, and by threats of legal proceedings, the said defendant Herman E. Stein so changed the form of the ballot, which ballots were used, so as to present the name of said L. L. Johnson, followed by the words, 'people's independent,' and also printed in another place on said ballot the name of L. L. Johnson, followed by the word 'democrat,' so that on each ballot presented, prepared for use, and used by the voters at said election in said county of Clay, the name of said L. L. Johnson appeared in two places, in one as people's independent and in the other as democrat. Said ballot, as prepared, printed, and used at said election, was in the exact form for said office of state senator as follows, to-wit:

SENATORIAL.

| For Senator 25th District. | Vote for one. |
|----------------------------|-----------------------|
| S. W. Christy..... | Republican. \| |
| L. L. Johnson..... | People's Independent. \| |
| L. L. Johnson .. | Democrat. |

“Your relator further shows that the ballots prepared

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for use and used by the voters of Hamilton county in said district were in the following form to-wit:

SENATORIAL.

| For Senator 25th District. | Vote for one. |
|---|---|
| S. W. Christy, Edgar, Clay Co..... | Republican. \| |
| H. W. Castle, Marquette, Hamilton Co... | Prohibition. \| |
| L. L. Johnson, Inland, Clay Co.. | { Democrat and Peo- ple's Independent. \| |

"Your relator alleges and avers that the use of the ballot printed as above stated by the county clerk of Clay county, Nebraska, and used at the election aforesaid for said office of state senator in said twenty-fifth district, was a deception and fraud upon the voters of said district, and gave the said Johnson an undue prominence on said ballot and an undue advantage over your relator at the said election. That while many democrats would not have voted for a people's independent candidate, but seeing the name L. L. Johnson followed by the word democrat without the words people's independent, voted for said Johnson, and many members of the people's independent party would not vote for a democrat and not knowing the democrats were running the said Johnson as their candidate for the same office, and seeing the name L. L. Johnson followed by the words people's independent without the word democrat, likewise voted for Johnson, both names being the same identical person and candidate for the same office."

These statements are sworn to positively by the relator. After the filing of this affidavit the relator asked and obtained leave to file an amended one in which nearly all these allegations are omitted, and he claims the office upon the broad ground that he had the largest number of votes cast at said election.

It may be said that the court should not refer to the first affidavit filed. The court, however, in permitting an amended affidavit to be filed, did not permit the relator to

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take the first one off the files without the consent of Johnson. In his first he makes a sworn statement that these votes were cast for Johnson as one person, and he nowhere denies it in his second. He also alleges as his ground for relief that Johnson thereby acquired an undue advantage. It is not claimed that there was any misrepresentation or that a single voter was thereby induced and did vote differently from what he intended, or that the result was to affect, much less change, the election. In no view of the case therefore does either of the affidavits state a cause of action.

In conducting a free government, parties are necessary. Parties, however, are formed to carry out certain specific objects. If the government is free to the full extent, it will be based upon equitable and just laws, with fair and impartial courts, open and ready, as far as possible, to redress grievances; in other words, where the rights of each and every one are protected and enforced. The courts are for the people, not a party, and every person may confidently appeal to them with the assurance that his rights and not his politics, when they are not involved, will be considered and adjudicated. If a court, upon some pretext which may nearly always be found, may throw out votes lawfully cast and thus defeat the will of the electors, government by the people to that extent is defeated, and an example of disregard of law set before them by the guardians and exponents of the law. It is the duty of all courts to carry out the lawfully expressed will of the electors as declared through the ballot box; and that duty this court not only recognizes, but will duly enforce. It is very clear that the relator has not the highest number of votes cast for senator of the twenty-fifth district, and that defendant Johnson has the highest number of such votes. The writ is therefore denied and the

ACTION DISMISSED.

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NORVAL, J., concurs in result and the propositions stated in the syllabus.

POST, J., concurs.

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STATE OF NEBRASKA, EX REL. JOHN PALMER, V. HERMAN E. STEIN, COUNTY CLERK, AND E. A. McVEY, INTERVENOR.

[FILED DECEMBER 20, 1892.]

ORIGINAL application for *mandamus*.

L. G. Hurd, S. W. Christy, G. M. Lamberton, and A. W. Agee, for relator.

Thomas H. Matters, and John M. Ragan, contra.

MAXWELL, CH. J.

The questions involved in this case are substantially the same as in *State, ex rel. Christy, v. Stein, ante*, p. 848, just decided, and the same judgment will be entered. The writ is denied and the

ACTION DISMISSED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. W. J. TURNER, V. H. E. STEIN, COUNTY CLERK, AND S. M. ELDER, INTERVENOR.

[FILED DECEMBER 20, 1892.]

ORIGINAL application for *mandamus*.

L. G. Hurd, S. W. Christy, G. M. Lambertson, and A. W. Agee, for relator.

Thomas H. Matters, and John M. Ragan, contra.

MAXWELL, CH. J.

The questions presented in this case are substantially the same as in the case of *State, ex rel. Christy, v. Stein, ante*, p. 848, and the same judgment will be entered. The writ is denied and the

ACTION DISMISSED.

THE other judges concur.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY
V. BERNARD CLARK.

[FILED DECEMBER 20, 1892.]

1. **Railroad Companies: NEGLIGENCE: NEEDLESSLY ALLOWING STEAM TO ESCAPE: PLEADING.** In an action against a railway company for negligently, wrongfully, and unlawfully blowing off steam from its engine whereby the plaintiff's horses were frightened and ran away, breaking his leg, etc., *held*, that the words employed implied that steam was blown off needlessly and unnecessarily, and as no objection had been made to the petition by demurrer, it was sufficient after verdict.

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2. ———: ———: ———: INJURIES FROM FRIGHTENING OF HORSES.

A railway company in the legitimate transaction of its business has the right to use steam and is not liable for the proper and necessary use of the same, even if it result in injury to others as by frightening horses and causing them to run away. If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine and frightens such horses and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence.

3. Evidence: QUESTION FOR JURY. There being testimony which would warrant the jury in finding a verdict against the defendant, it was properly submitted to them, and the court did not err in refusing to direct a verdict for the defendant.

ERROR to the district court for Madison county. Tried below before NORRIS, J.

John M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

E. P. Wigton and E. F. Gray, contra.

MAXWELL, CH. J.

This action was brought by the defendant in error against the plaintiff in error to recover for personal injuries, and on the trial the jury returned a verdict in his favor for the sum of \$4,835, upon which judgment was rendered. The questions presented are, many of them, new in this court. The cause of action is set forth in the petition as follows:

“That at the time of the committing of the wrongs and injuries hereinafter complained of, the said defendant was, and still is, a corporation duly incorporated and organized under and pursuant to the laws of the state of Nebraska; and then and ever since owned and operated with its locomotives and cars a railroad leading from Columbus, in Platte county, Nebraska, to and through the city of Norfolk, in Madison county, Nebraska; that at said time of the commit-

ting of the wrongs and injuries hereinafter mentioned said city of Norfolk was a city of the second class, compactly built up, of the population of 5,000 inhabitants, and then had and long prior and ever since has had, a street named Norfolk avenue, and also called Main street, passing through said city in its most central and business portion, and running east and west, which said street then was, and had been, and still is, the principal street, roadway, and thoroughfare of said city; that at said time of the committing of the wrongs and injuries hereinafter complained of, the defendant's said railroad and its side tracks crossed the said principal street, roadway, and thoroughfare in the central and most public business portion of said city, running north and south; that at said time of the committing of the wrongs and injuries hereinafter complained of, the said defendant, by its servants and agents, negligently, wrongfully, and unlawfully stopped, left, and permitted its locomotive engines to stand and remain headed south for a long time, viz., for the space of twenty minutes, on its side track, at the north margin of said principal street, at the point of the said crossing of the same by said railroad and side tracks, and at the same time negligently, wrongfully, and unlawfully omitted and neglected to have at said crossing any flagman or person to give warning; that on the 13th day of August, 1888, the said plaintiff was engaged in hauling dirt with his team of horses and wagon upon said principal street, roadway, and thoroughfare, in said city, to grade the same and other streets, and necessarily had to pass and repass over the said crossing of the same by said railroad and side tracks with his said team and wagon, and having unloaded his said wagon of dirt in one of the said streets, and the plaintiff then standing upon the dirt bed or planking floor of his wagon necessarily, without any negligence, wrong, default, or want of due care on his part, drove his said team of horses and wagon west in the center of said principal street, roadway, and thoroughfare to pass over said cross-

ing, when, as plaintiff had so driven his team upon said crossing, in the center of said principal street, in front of said locomotive engine and about fifty feet from it, so left standing as aforesaid, the said defendant, by its servants in charge of its said locomotive engine, negligently, wrongfully, and unlawfully, suddenly, and without warning to the plaintiff, let off and discharged steam from said locomotive engine and from the cylinders thereof in great volume, noise, and hissing sound, by means of which, and the several negligent, wrongful, and unlawful acts, omissions, and defaults of the defendant, its servants and agents, above stated, the said team of horses took fright, became unmanageable, ran away, and threw the plaintiff off from his said wagon, down under the same, and ran said wagon and the wheels thereof over him, whereby he was greatly injured, his right leg between the knee and ankle was crushed and both bones thereof broken in several places and mashed into several pieces, the thigh of the same leg was bruised and injured, his left leg and thigh and ankle were bruised and injured, his head was cut and bruised, and he was otherwise bruised and injured, from which injuries he became and was, from thence hitherto, sick, sore, and crippled and unable to carry on his usual work and business, and from which injuries he has from thence hitherto suffered great pain and anguish, and from which injuries he is permanently crippled and injured, and will continue to suffer pain and anguish for the remainder of his life; and that he has necessarily incurred, expended, and paid out for surgical and medical attendance, medicine, and nursing in endeavoring to be cured of said injuries the amount of \$325, and that the plaintiff's entire damages in the premises are \$10,000."

To this petition the railway company made answer, in substance, denying that its employes wrongfully, negligently, and unlawfully permitted its engine to stand on the track at the point indicated or that there was no watchman at the crossing named; denies that the plaintiff was driving

in the streets and that the locomotive in question suddenly, without warning, let off steam from the cylinders, with other special denials which need not be noticed. It will thus be seen that the question of negligence of the company and the contributory negligence of the plaintiff below were fairly presented to the jury.

It is insisted with great earnestness on behalf of the plaintiff in error that the petition fails to allege actionable negligence, and we are referred to the case of *A. & N. R. Co. v. Loree*, 4 Neb., 446. In that case it was held, in effect, that there was a failure to allege that the arrangement of material on the cars was unusual and unnecessary in the legitimate transaction of the business of the company. It was also held, in effect, that the words "scare crow," "horrid," and "frightful appearance," without stating in what respect, were not sufficient to raise an issue, and therefore, taking the whole petition together, it failed to state any dereliction of duty on the part of the company, and in our view the decision is correct. The petition in this case, however, charges that the railway crosses one of the principal streets of the city; that no flagman was placed there; that the plaintiff below, without notice or knowledge of the presence of the engine, drove to the center of the street to pass over the railway and about fifty feet in front of a locomotive when the person in charge thereof "negligently, wrongfully, and unlawfully, suddenly, and without warning to the plaintiff, let off and discharged steam from said locomotive engine and from the cylinders thereof in great volume, noise, and hissing sound," etc., by means whereof his horses were frightened and ran away. If steam was blown off "negligently, wrongfully, and unlawfully," then it was unnecessary, and in violation of its duty. Had any question been raised upon the petition a demurrer should have been interposed and its legal effect determined before going to trial. This was not done, but its sufficiency in effect conceded; and liberally construed, it states a cause of

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action. In saying this we are not to be understood as deciding that where the cylinder cocks are opened and steam necessarily blown off and horses frightened thereby that the company is liable for the damages. (*Hahn v. Southern P. R. Co.*, 51 Cal., 605; *Beatty v. Cent. I. R. Co.*, 58 Ia., 242; *Abbot v. Kalbus*, 43 N. W. Rep. [Wis.], 367. In the case last cited it is said, in effect, that the evidence did not show that the locomotive made any other than the usual noises, and all the cases cited by the plaintiff in error are to the same effect. But it is said that even if the law is as contended by the defendant in error, still there is no evidence in support of the charge.

One George R. Latimer, a civil engineer, called as a witness by the plaintiff below, testified that he was about 600 feet away from the engine at the time of the occurrence; that his attention was called to the scene of the accident by the escape of steam.

Q. You may state what attracted your attention and what you saw.

A. Well, I think there were several of us there together and a remark something like this was made—I think that the remark was made by some of us—that that engine was making an unusual amount of noise; that was about the remark.

Q. A remark was made by some one in regard to the engine?

A. Yes, sir.

Q. Did you look up then to see?

Q. What did you do when that remark was made?

A. I turned around and saw a team running away.

Q. You remember looking around and seeing a team running away; whose team was that?

A. I learned afterwards that it was Mr. Clark's team.

Q. Bernard Clark, the plaintiff?

A. Yes, sir.

Q. Did you see the man that was hurt?

A. Yes, sir.

Q. State whether or not he was the same man that was driving that team.

A. Yes, sir.

Q. Now you may state whether or not that was Bernard Clark, the plaintiff.

A. Yes, sir,

Q. It was?

A. Yes, sir.

Q. Now, as you looked up and saw this team running away, did you see an engine near to the team?

A. Yes, sir.

Q. Where, as you looked up, was the team and was the engine; where was the team, what part of the street, or that crossing, that railroad crossing?

A. Well, it was just near the crossing—just on the crossing, or coming to the crossing going west.

Q. Just on the crossing, or just coming to the crossing?

A. Yes, sir; the team.

Q. Now, where was the team with reference to the middle of the street?

A. It was very near the middle of the street.

Q. Now, where was this engine that you saw with reference to the team?

A. It was north of the street.

Q. Now, how near to the north—that street runs east and west?

A. Yes, sir.

Q. And the railroad tracks run north and south, or nearly so?

A. Yes, sir.

Q. Now, where was the engine with reference to the north margin of the street?

A. Well, it was very close; it was not very far away; it was not very far from the street.

On the cross-examination he testified:

Q. Which direction was you looking at that particular time?

A. Well, my recollection is that I was facing a little bit northwest.

Q. Well, now, what were you looking at at the time, or just before you heard the noise that you have testified to, and what were you doing?

A. I was looking at the winding up the tape.

Q. You was looking at the tape, was you not?

A. Yes, sir.

Q. Who was with you there?

A. I don't remember who the parties were?

Q. Do you remember who they were or how many there were?

A. I think that there were two.

Q. Well, now, what do you remember as to buildings on that side of the street where you were, between you and the Elkhorn Valley track and the U. P. tracks?

A. Well, my recollection is that there was this building that we have been speaking of—the Gravel grocery—that is my recollection of it.

Q. Do you remember of any other buildings along there?

A. I don't call to mind just now; there may have been a house.

Q. What grocery did you call that?

Q. I think it is called the Gravel grocery. There may have been a residence or two there also.

Q. Well, now, while you was winding up this tape and paying attention to the tape, what was it that first called your attention to the runaway team?

A. Well, I think it was the noise of the steam that I heard.

Q. Well, now, did you hear steam any more after you observed the runaway?

A. I don't remember of hearing any noise after the

team was excited at that time that I looked around and saw both of them.

Q. You was in the habit of passing up and down that street frequently?

A. Yes, sir.

Q. And was in the habit of seeing trains and engines passing over this particular street?

A. Yes, sir.

Q. As you came to and from your place of residence?

A. Yes, sir.

Q. Had you not frequently heard these engines letting off steam and making a noise?

A. Yes, sir.

Q. Was there anything particular about this noise which called your attention more than any ordinary noise that happens as you go up and down that street when you have heard other engines letting off steam?

A. I presume, probably, that I have heard the noise before and since.

M. Phillips, a carpenter, testifies that he was at work on the roof of a story and a half building, about one block from the engine at the time of the accident, and saw what transpired.

Q. You may state what you saw and heard with reference to the engine at the time that you saw the team.

A. Well, I heard an unusual amount of steam, that is what attracted my attention, that is the reason that I looked that way and at the same time I saw the team.

Q. State whether you saw the team or not.

A. Yes, sir.

Q. Where did the steam escape from?

A. I think that the engine was going off at the time and also escaping from the cylinder cocks.

Q. In referring to the cylinder cocks, what part of the engine do you refer to.

A. The steam chest.

O. & R. V. R. Co. v. Clark.

Q. You mean down on the sides of the engine?

A. Yes, sir.

Q. Whereabouts is that with reference to the front trucks?

A. It is right over the front trucks.

Q. And about how high up are these steam cylinders?

A. Just about a couple of feet.

Q. What kind of a sound was this escaping steam?

A. It was a hissing sound, the same as steam escaping.

Q. Now, what was it that first attracted your attention and caused you to look that way?

A. It was the noise of the steam.

Q. When you first looked up, on your attention being so attracted, was that the time that you spoke of as first seeing the steam?

A. Yes, sir.

Q. After you first looked up and first saw the team what was the team doing then, where were they? Just state what the team was doing, and what the driver was doing; state all the facts as you first looked up.

A. Well, the team was running, it had started to run; it was under pretty good headway.

Q. Did you notice it when it had started to run?

A. No, sir; I did not.

Q. It was running when you looked up and saw it?

A. Yes, sir.

Q. State whether it went faster after you first looked up?

A. Yes, sir; it went faster afterwards.

Q. Well, now, about the driver, did you notice that he was holding onto the lines when you first looked up?

A. Yes, sir; he was on the wagon holding onto the lines.

Q. Did you notice his position on the wagon?

A. I think he was sitting down.

Q. When you first looked up and saw the team, as you spoke of a little while ago, what was its position; I want to locate its position when you first looked up and saw the

team, where was it with reference to the front of the engine?

A. It was between me and the engine and a little west.

Q. Of what?

A. When I first looked up to see it was a little bit west of the engine, probably the length of the wagon west of the engine.

Q. It was a length of the wagon west of the engine then?

A. Yes, sir, when I first noticed it.

Q. How long did that engine keep letting off steam from the cylinder cocks, so far as you noticed it, at that time?

A. I did not pay any more attention to the engine; I kept my eye on the team while after they passed by where I was at work.

Q. Did you notice by hearing or seeing whether the steam kept on blowing or let up?

A. I could not say about that.

The plaintiff below testifies:

A. I drove carefully up to within about 100 feet of the crossing, then I tightened on the lines and braced myself up, I did not know but what the engine might move, and I prepared myself for any emergency that might take place the best I could.

Q. Did you still remain standing—was you standing?

A. Yes, sir.

Q. That was within about 100 feet of the crossing.

A. Yes, sir.

Q. What occurred then?

A. I went on slowly; I could not tell whether I was trotting or walking; I could not tell which; as I was on the crossing and entering on the track in front of the engine, the engine blew off steam, a loud hissing noise.

Q. At that time was you still standing up?

A. When the engine blew off steam and the team jumped I sat down on the wagon and pulled on the lines.

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Q. How did you sit down?

A. Well in pulling on the lines, I sat down quietly.

Q. Stand up and just show us how you pulled on the lines and sat down.

A. Pulled that way and sat down (witness showing the jury how he did).

Q. Steadied yourself with the lines?

A. Yes, sir.

Q. You held the lines as tight as you could; your feet were towards the horses?

A. Yes, sir; towards the horses.

Q. Just tell us again what point you were at when the team took fright and jumped, with reference to the front of the engine.

A. I said that I was entering on the railroad or railway just entering on it, my team was just entering the railroad track that the engine was on.

Q. When the team jumped?

A. Yes, sir.

Q. Had you got on past the engine when they first jumped?

A. The team was entering the track that the engine was on at the time the noise was made from the engine.

Q. Now, this noise from the engine; state the appearance of any steam that you saw or heard.

A. I did not see any steam; I heard a loud hissing, continuous blowing off of steam.

Q. You say that you did not see it?

A. No, sir.

Q. Did you have time to look at it?

A. No, sir.

Q. What did you say that the sound was?

A. It was a hissing sound.

Q. Now state, with reference to the time the team started to run, whether the steam escaped just before or after.

Q. State when you heard the hissing sound with reference to the time that the horses started.

A. Why the horses started when they heard the noise of the steam—not until then.

There is considerable other testimony to the same effect. Some of the witnesses on behalf of the company testify that the noise was made by the escape from the pop valve over which the engineer had no direct control. The question thus became proper to submit to a jury, and under the state of proof in this case the court will not disturb their findings.

It is unnecessary to review the instructions at length. The principal contention of the plaintiff in error is that there is no liability shown, and in effect that the jury should have been so instructed; but in our view the court below did right in submitting the questions to the jury. The questions of fact seem to have been fairly submitted. That a railway company, when necessary in operating its road, may blow off steam in the crowded thoroughfare of a city as well as other places is undoubted, even if by doing so horses will be frightened and losses thereby sustained, but it has no right to do so wantonly or when unnecessary to do so. While the rights of the company are to be respected and protected, other persons also have rights which in like manner must be respected by the company and its employes. The right of the public to use the streets of the city are equally as broad as the right of the company to use its tracks, and neither can willfully commit an injury whereby loss is sustained by the other without liability.

The case of *Andrews v. Mason, etc., Ry. Co.*, 42 N. W. Rep. [Ia.], 513, is very similar in its facts to this case, and it was held that the company was liable. In that case the plaintiff's team was frightened by the discharge of steam and ran away and committed injury for which the plaintiff was permitted to recover. The same rule was applied in *Man-*

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chester, etc., Ry. Co. v. Fullarton, 14 C. B., n. s. [Eng.], 53; *Toledo, etc. Ry. Co., v. Harmon*, 47 Ill., 298; *Nashville, etc., Ry. Co. v. Starnes*, 9 Heisk. [Tenn.], 52, and is approved by Judge Thompson in his valuable work on Negligence, vol. 1, pp. 351, 352. He says: "Whilst no liability attaches for damages arising from the doing of these acts under proper circumstances, yet it will be different if they are done without necessity, negligently, or wantonly. For although, as will be shown in a subsequent chapter, the rule obtains in England, and generally in this country, that a master is not answerable in damages for the wanton and malicious acts of his servant, yet enlightened American courts have refused, on cogent grounds of public policy, to extend this immunity to railway corporations whose servants are entrusted with such extensive means of doing mischief. Accordingly it has been held that if such a servant, while in charge of the company's engines and machinery, and engaged about its business, willfully perverts such agencies to purposes of wanton mischief the company must respond in damages. This doctrine has been applied where the person in charge of a railway locomotive frightened a traveler's horse by blowing off steam and sounding the steam whistle with a loud noise when it was wholly unnecessary." This, we think, is a correct statement of the law. Upon the whole case the questions were proper to submit to a jury and there is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

Themanson v. City of Kearney.

CAROLINE, THEMANSON, ADMINISTRATRIX, v. CITY OF
KEARNEY.

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| 35 | 881 |
| 48 | 76 |

[FILED DECEMBER 20, 1892.]

Municipal Corporations: ESTABLISHMENT OF GRADE: NEGLIGENCE: ACTION FOR DAMAGES FOR FLOODING CELLAR: INSTRUCTIONS. Under section 31 of chapter 9, General Statutes of 1873, a city of the second class was authorized to establish the grade of its streets by ordinance. In an action for damages for flooding the plaintiff's cellar in which his goods were stored, caused by filling up the street adjacent to the lot without the grade being established, *held*, that an instruction which in effect told the jury that the grade might be established otherwise than by ordinance was erroneous.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Greene & Hostetler, for plaintiff in error.

Calkins & Pratt, contra.

MAXWELL, CH. J.

This action was commenced June 3, 1884, in the district court of Buffalo county, by the plaintiff against the defendant. The allegations of the petition charge that in the year 1883 the defendant herein proceeded to grade up a certain street, to-wit, Wyoming avenue in said city, and did throw up the same to the height of three feet above the common level; that at a point on said avenue where said grading was done and where said avenue crossed South Railroad street, the surface water from a large area of ground was accustomed to flow in an easterly direction across Wyoming avenue in large volumes in time of rain; that said defendant, well knowing that fact, so carelessly and negligently constructed said embankment as to make no culvert or other outlet for said water to pass away in

Themanson v. City of Kearney.

its natural course; that at said point on said avenue as above described, plaintiff had on the first day of April, 1884, a store-room, said store-room being on the west side of Wyoming avenue, and on the south side of said South Railroad street; that at said time the basement of said store-room contained a large quantity of groceries and provisions of the value of \$3,000; that on said first day of April, 1884, a heavy rain fell, and that by reason of such embankment and levee, as above described, and by reason of the negligence and unskillful manner in which it had been erected by said defendant, the surface water was held and turned back from its natural course in a large volume into the store-room and basement of the plaintiff, all without plaintiff's fault, and that said goods and groceries were damaged and destroyed. To this petition defendant made answer, admitting that it graded up the street in question; denies that it graded it up three feet above the level; denies that it graded said street above the grade which had long prior thereto been established; alleges that the windows and the basement of the building are below the grade theretofore established by proper authorities of said city; alleges that if there was any overflow of said cellar, it was caused by the negligence of the plaintiff; alleges that it dug a channel for the escape of the water which had previous thereto flowed eastward across said avenue.

Plaintiff replied to said answer denying each and every allegation of new matter. The case was afterwards tried to a jury and a verdict and judgment for the defendant.

The first error assigned in the plaintiff's brief is in giving the third instruction, which is as follows: "If the city procured the street to be built up and constructed with the grade which it declared established, then such grade was in fact established, and after such grade had been so constructed for a reasonable length of time the keeper of the grocery store was charged with notice of its existence, and if his landlord failed to raise the building to grade, or to protect

Themanson v. City of Kearney.

the walls below grade against the usual action of surface water, it became the duty of Mr. Themanson, so far as the city is concerned, to himself embank or otherwise protect the walls below grade if he would leave his wares and merchandise in the cellar."

It is admitted that no ordinance was ever passed establishing a grade and the question arises did any lawful grade exist when the grading was done? The alleged grade is claimed to have been established in 1874. Kearney was at that time a city of the second class, having a population of more than 500 and less than 15,000 inhabitants. The statute provides that cities of the kind named are "authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by this act: To open and improve streets, avenues, and alleys, make sidewalks, and build bridges, culverts, and sewers, within the city; and for the purposes of paying for the same, shall have power to make assessments in the following manner." Then follows the mode of assessment. This mode of establishing grades would seem to be exclusive. The case of *Hurford v. City of Omaha*, 4 Neb., 336, is not in conflict with this view. In that case it was held, under the special charter of that city, that the proof showed that the grade of St. Mary's avenue was established in 1866 and not in 1873. In the case at bar, however, the only authority to establish a grade was by ordinance, and as it was not so established, the instruction in question was erroneous. (*Fulton v. City of Lincoln*, 9 Neb., 358.) The doctrine of estoppel is relied upon by the defendant, but as it is not pleaded it cannot be considered. The other questions discussed in the briefs do not seem to be relied upon by the attorneys and will not be considered. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 50 | 757 |

J. C. ELDREDGE ET AL. V. AULTMAN, MILLER & Co.

[FILED DECEMBER 20, 1892.]

Action on Domestic Judgment. In this state an action can be maintained on a domestic judgment.

ERROR to the district court for Lancaster county. Tried below before **TIBBETS, J.**

H. H. Blodgett, for plaintiffs in error.

Davis & Hibner, contra.

NORVAL, J.

The petition filed in the court below contains two counts. In the first it is alleged, in substance and effect, that defendant in error recovered a judgment against plaintiffs in error before B. H. Turner, a justice of the peace of Fillmore county, for the sum of \$70.95 and costs, taxed at \$3.20; that a transcript of said judgment has been duly filed in the office of the clerk of the district court of Fillmore county; that the defendant in error has paid the above costs in full, and there is due and unpaid on said judgment the sum of \$74.15 and interest.

For a second cause of action it is averred that the defendant in error recovered a judgment against plaintiffs in error before John Barsby, a justice of the peace within and for Fillmore county, for \$30.35, and costs of suit, taxed at \$2.90; that a transcript of said judgment has been duly filed in the district court of said county; that defendant in error has paid all of said costs; that plaintiffs in error have never paid said judgment, or any part thereof, except \$15.90, and that there is due upon said judgment \$16.35 and interest thereon. The prayer is for a money judgment.

Eldredge v. Aultman.

To the petition the plaintiffs in error, defendants below, filed a general demurrer, which was overruled by the court, and they electing to stand upon their said demurrer, judgment was rendered against them and in favor of plaintiff below in accordance with the prayer of the petition.

Counsel in the brief of the plaintiffs in error assumes that this is an action to revive dormant judgments, and argues therefrom that, as the original judgments were obtained in Fillmore county, proceedings to revive them must be brought in that county and in the court in which they were rendered; therefore the district court of Lancaster county had no jurisdiction of the subject-matter. No such question was presented to the court below; besides counsel is in error in supposing that this is an action of revivor. This is in no sense such a proceeding. The object and purpose of the suit is to recover a new judgment for the amount due and unpaid on the original judgments described in the petition. Hence it is unnecessary to decide whether an action to revive a judgment can be brought in a county other than that in which the judgment was rendered.

The sole question presented for decision is: Can a suit be maintained on a judgment recovered in this state? At common law an action lies on a domestic judgment, and there is no statutory provision in this state which takes away that right. True, a domestic judgment may be enforced by execution, but such remedy is not exclusive. It is merely cumulative. A judgment, whether foreign or domestic, is a debt of a high order, and a recovery may be had upon it as upon any other contract. While there is some conflict in the decisions, the proposition stated is sustained by the great weight of authority in this country. (Black, Judgments, sec. 958; *McDonald v. Butler*, 3 Mich., 558; *Headley v. Roby*, 6 O., 521; *Burnes v. Simpson*, 9 Kan., 658; *Hummer v. Lamphear*, 32 Id., 439; *Ames v. Hoy*, 12 Cal., 11; *Stuart v. Lander*, 16 Id., 372; *David-*

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son v. Nebaker, 21 Ind., 334; *Becknell v. Becknell*, 110 Id., 42; *Greathouse v. Smith*, 4 Ill., 541; *Denison v. Williams*, 4 Conn., 402; *Ives v. Finch*, 28 Id., 112; *Kingsland & Co. v. Forrest*, 18 Ala., 519; *Elliott v. Holbrook*, 33 Id., 659; *Church v. Cole*, 1 Hill [N. Y.], 645; *Wilson v. Hatfield*, 121 Mass., 551; *Stewart v. Peterson's Executors*, 63 Pa. St., 230; *Haven v. Baldwin*, 5 Ia., 503; *Simpson v. Cochran*, 23 Id., 81; *Thomson v. Lee County*, 22 Id., 206.)

It follows from what has been said that the petition states grounds for action, and that the court did not err in overruling the demurrer. The judgment is

AFFIRMED.

THE other judges concur.

**THEODORE H. MILLER, APPELLEE, V. JOHN LANHAM,
APPELLANT, ET AL.**

[FILED DECEMBER 20, 1892.]

1. **Judicial Sales: INADEQUACY OF PRICE: CONFIRMATION.**
Evidence examined, and held, that the value of property sold by virtue of a decree of foreclosure is not so greatly in excess of the value found by the appraisers as to call for the setting aside of the sale.
2. ——— : ——— : ——— : **HARMLESS ERROR.** A sale will not be set aside for irregularities or errors not prejudicial to the party complaining.
3. ——— : ——— : ——— : **FAILURE OF PURCHASER TO PAY OFF PRIOR LIENS.** A sale will not be set aside on the motion of a mortgagor on the ground that the purchaser has not paid off claims adjudged to be prior liens upon the property sold.
4. ——— : **NOTICE: DESCRIPTION OF PROPERTY.** A notice of sale under a mortgage or decree will generally be held sufficient if the property be described as in the mortgage or decree.

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| 35 | 886 |
| 60 | 8 |

APPEAL from the district court for Saline county.
Heard below before MORRIS, J.

Abbott & Abbott, and Webster, Ross & Fisher for
appellant.

F. I. Foss, contra.

POST, J.

This is an appeal from an order of confirmation by the district court of Saline county. From the transcript it appears that on the 18th day of December, 1889, the appellee Miller recovered judgment against the appellant Lanham for \$7,793.25 and \$72.95 costs, and a decree of foreclosure against the following described property, to-wit: All of section 36, town 8, range 3 east; a part of the north-east quarter of the northeast quarter of section 33, town 8, range 4 east, which is more particularly described in the decree and order of sale; also a part of lot 1, in block 1, in the city of Crete. On the 14th day of December, 1889, judgment was entered against appellant in favor of the Union Trust Company, of Philadelphia, for \$7,545.90 and a decree of foreclosure against section 36, and which was adjudged to be the first lien thereon. On the 2d day of April, 1890, the Union Trust Company, of Omaha, recovered judgment against appellant for \$600 and a decree of foreclosure against said section 36, which was adjudged to be a second lien thereon. On the 2d day of April, 1890, the First National Bank of Crete recovered a judgment against appellant for \$4,348.70 and a decree of foreclosure against the property in lot 1, block 1, city of Crete, which was adjudged to be a first lien thereon and upon which there had been paid the sum of \$3,172.52 prior to the issuing of the order of sale. On the 4th day of December, 1890, an order of sale was issued, by virtue of which the property above described was advertised for sale and sold

Miller v. Lanham.

to the appellee. On the return of the order of sale a motion was made by the appellant to set aside the sale, which was sustained as to the fractional part of the northeast quarter of the northeast quarter of section 33, and overruled as to section 36, and part of lot 1, block 1, in the city of Crete, as described in the decree. Exception was taken by appellant to the overruling of his motion and the case removed to this court by appeal. Said motion is as follows:

"And now comes the said defendant John Lanham, and objects to the confirmation of the sale herein heretofore had, and moves the court to set the same aside for the following reasons:

"First—That the property sold herein was appraised far below its actual value, and so far below its value as to show fraud, collusion, partiality, or incompetency on the part of the appraisers, as is shown by the affidavits of John Lanham, Charles E. Chowins, Thomas Patz, and Jacob Wagerman hereto attached.

"Second—That the property was sold at a grossly inadequate price, in this, that the same is, and at the time of the sale herein was, well worth the sum of \$27,800, and is shown by affidavits hereto attached.

"Third—That there is error and irregularity in said sale, in this, that the decree of foreclosure in said case embraces with the amount found due to the plaintiff Miller, being \$7,793.75, the amount found due to the Union Trust Company, of Philadelphia, being \$7,545.90, and the amount found due to the Union Trust Company, of Omaha, \$600, and the amount found due to the First National Bank of Crete, Nebraska, being \$4,348.70, and consolidates all these amounts into one amount, and orders that there be but one sale for all, and the order of sale herein recites all of said amounts and purports to sell the property therein described to satisfy all, while the sheriff has reported and placed on file the existence of prior incumbrances against the section of

land described to the amount of \$8,754.57, \$8,053.70 of which is a part of the amount recited in said order of sale and is a part of the amount for which said sale was made, and therefore cannot be incumbrances prior to the amount for which the sale was being made; thus it is made to appear, by inspection of the files and proceedings in the case, that the incumbrance against said section of land is \$8,053.70 greater than actually exists, and that a *bona fide* purchaser would reduce his bid by that much; all of which will more fully appear by an inspection of the files of this case.

“Fourth—And the defendant alleges further error and irregularity in said sale in relation to that part of lot 1, block 1, of the city of Crete, described in said proceedings, in this, that the sheriff reported and placed on file prior incumbrances against said part of lot 1, block 1, to the amount of \$1,312.50, while, as a matter of fact, the said amount of \$1,312.50 is that portion of said decree determining the amount due to the said bank, and for which said property was being sold, and therefore was not and could not be prior incumbrances, thus making the amount against said property appear by said proceedings to be greater by \$1,312.50 than it really was, whereby the bid of a purchaser would be reduced by that amount.

“Fifth—There is further irregularity in the proceedings of said sale, in this, that no money was paid by the purchaser, Miller, to the sheriff, with which to pay the amounts due to the other beneficiaries in said decree; that in fact no money at all was paid or offered by the purchaser, Miller, at said sale to any one for any purpose.

“Sixth—That the advertisement of sale published herein was defective and misleading, in this, that the farm property offered for sale was one section by government survey; that the advertisement was such as to advise people that the said section should be sold in bulk; that if said section had been advertised and offered for sale by government subdivisions of a section, it would have sold to a much better advantage and for a larger amount.

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“Seventh—The advertisement herein is not in accordance with the appraisement herein, in this, that the said section is appraised in government subdivisions, to-wit, quarter sections, while in the advertisement the entire section is offered in bulk, whereby persons desiring to buy quarters or lesser subdivisions were misled and prevented from attending the sale.

“Eighth—That the proceedings by which the said sale were had and the sale itself are in other respects informal, incomplete, and insufficient, whereby material injury has resulted to the said defendant. All of which will more fully appear by inspection of the files in this case and affidavits herewith filed.”

The allegation in the motion with respect to the value of the property is not sustained by the evidence in the record. The presumption is in favor of the finding of the appraisers, who are sworn to impartially appraise the interest of the defendant or mortgagor.

The appellee, in addition to his own evidence, introduced the affidavits of seven apparently credible witnesses who are familiar with the property and its value, and who testify that the finding of the appraisers is above rather than below its value.

The order of the district court complained of is sustained by the clear preponderance of the evidence, and there is no error in the overruling of the motion to set aside the sale on that ground. Nor is there any foundation in the record for the contention that the appraisers deducted from the value of the different tracts, or either of them, any part of the decree in favor of appellee.

By reference to the appraisement of section 36 we find that the value thereof is found to be \$16,320, while the amount deducted on account of prior liens as taxes, \$700.87, and mortgages, as per certificate of register of deeds, \$8,053.70. The prior liens, as certified by the register of deeds and clerk of the district court, exceed the amount deducted by

more than \$800, but the omission is an error prejudicial to the appellee, who is the purchaser, and not to the appellant. The amount deducted from the value of the fractional lot 1 in block 1, in the city of Crete, is, taxes, \$24.70, and liens, as per certificate of register of deeds, \$1,312.50, the last named amount being evidently the balance due on the decree in favor of the First National Bank of Crete. It is alleged that the appellee did not on the day of the sale pay to the sheriff the amounts adjudged to be prior liens upon the premises. This is a failure, if true, of which the appellant cannot complain. It is apparent that appellee bought subject to the decrees in question, thereby recognizing them as prior liens. It appears, however, from his affidavit, which is not disputed, that he offered to pay the amount to the sheriff as soon as it could be ascertained, but that the latter declined to receive it. It further appears that he is ready and able to pay the amount of all prior liens whenever he is adjudged to be entitled to a confirmation of the sale. It is next objected that the notice of sale is defective and misleading, for the reason that section 36 was advertised for sale as an entirety, whereas it should have been advertised and offered for sale in parcels or fractions of a section. A sufficient answer to this objection is, that in the decree of appellee, as well as the two decrees adjudged to be prior to his, the property in question is described as section 36 without reference to subdivisions thereof. A notice of sale under a mortgage or decree will generally be held sufficient if the property be described as in such mortgage or decree. (*Model Lodging H. Ass'n v. Boston*, 114 Mas., 133.) It appears from the record, however, that the property in question was appraised in four separate tracts or quarter sections. It further appears that each quarter section was offered for sale separately, but without bidders, after which the entire section was offered for sale and sold to appellee for \$6,000, being more than two-thirds of the appraised value of ap-

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pellant's interest therein. We have carefully examined the entire record and are unable to discover any error prejudicial to the rights of the appellant. In our judgment the order of the district court confirming the sale is right and should be

AFFIRMED.

THE other judges concur.

OTTO SIEMSEN V. WILLIAM R. HOMAN.

[FILED DECEMBER 20, 1892.]

1. **Real Estate Brokers: SALE OF LANDS: WHEN RIGHT TO COMMISSION ACCRUES.** A real estate broker who is employed to sell or dispose of the property of his principal is entitled to recover his commission whenever he has procured a customer who is willing and able to purchase the property at the price and upon the terms named by his principal.
2. ———: ———: ———: **INABILITY OF PURCHASER TO COMPLY WITH TERMS OF AGREEMENT.** *Held*, That the evidence clearly shows that the customer was not able to purchase in accordance with the terms of his agreement and that the broker is not entitled to recover.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Cavanagh, Atwell & Thomas, for plaintiff in error:

Whenever a broker or real estate agent seeks to recover his commission he must establish that he has procured a purchaser who is ready and willing and has the financial ability to complete the purchase. (*Vinton v. Baldwin*, 88 Ind., 104; *Lune v. Albright*, 49 Id., 275; *Reyman v. Mosher*, 71 Id., 596; *Moses v. Bierling*, 31 N. Y., 462; *Mooney v. Elder*, 56 Id., 238; *Hart v. Hoffman*, 44 How. Pr. [N. Y.], 168;

Richards v. Jackson, 31 Md., 250; *Mechem, Agency*, sec. 966; *Iselin v. Griffith*, 62 Ia., 668; *Coleman v. Mead*, 13 Bush [Ky.], 358; *Pratt v. Hotchkiss*, 10 Ill. App., 603.)

Kennedy & Learned, contra:

Where a real estate broker has procured a purchaser for the property of his principal, the solvency and ability of such purchaser to perform the obligations of his contract will be presumed until the contrary is proven. (*Grosse v. Cooley*, 45 N. W. Rep. [Minn.], 15; *Crevier v. Stephen*, 40 Minn., 288; *Goss v. Broom*, 31 Id., 484.)

POST, J.

This is a petition in error from the district court of Douglas county. The material part of the petition in that court is as follows:

“The plaintiff complains of the defendant for that on or about the 20th day of February, 1889, said defendant placed in the hands of the plaintiff as agent to sell, trade, or dispose of lot 11 in block 33, Kountz Place, an addition to the city of Omaha, on the sale, trade, or disposal of which the defendant agreed to pay the plaintiff the sum of \$200. On or about the 27th day of February, 1889, the plaintiff sold, traded, and disposed of said lot for the benefit of said defendant, and has duly performed all the conditions of said contract on his part to be performed.”

The answer is a general denial. From the bill of exceptions it appears that the defendant in error procured from one F. P. Roll an offer to exchange certain real estate owned by the latter in the city of Omaha for the property of the plaintiff in error, which resulted in the execution of the following agreement in writing:

“OMAHA, NEB., February 26, 1889.

“This memorandum of agreement witnesseth, that Otto Siemssen has this day sold to Frank P. Roll lot 11 in block

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33, Kountz Place, subject to \$3,500 first mortgage and accumulated interest in favor of Union Trust company, said Roll to give said Siemssen a second mortgage of \$1,500, due in one, two, and three years from this date, on said Kountz Place lot, drawing eight per cent interest, and the east fifty feet of the west one hundred and forty feet of lot 16, Bartlett's addition, all of above described property situate in Omaha, Douglas county, Nebraska; said lot in Bartlett's addition is to be conveyed subject to a mortgaged indebtedness of \$2,800, including interest, also subject to special taxes, each party to furnish abstract of title, and each party to pass title to the other as soon as the necessary papers can be made out and executed."

It is conceded that the amount of mortgages appearing of record as liens against the property to be conveyed by Roll was about \$3,100, or \$300 in excess of the amount stipulated in the agreement set out above. Defendant in error, having been notified that the liens against said property exceeded the amount specified in the agreement, requested plaintiff in error to assume that amount in addition to the liens provided for and allow Roll to assume other incumbrances as a consideration therefor. This proposition was rejected by plaintiff in error. The latter, on the 4th day of March, notified defendant in error by letter that unless the necessary conveyances were executed by Roll in accordance with the terms of the contract within twenty-four hours he would consider the trade at an end. On the 8th day of February following Roll wrote plaintiff in error as follows:

"OMAHA, NEB., February 8, 1889.

"*Mr. Otto Siemssen*—DEAR SIR: I am ready to make the trade with you consummated by Mr. Homan according to the terms of the agreement entered into between us, and shall expect you to comply with your part of the engagement.

Respectfully yours,

"F. P. ROLL."

There is, however, no competent evidence that Roll had reduced the amount of liens against his property to the amount above named, or that he was able to convey in accordance with the terms of his contract. The only evidence on that point is the testimony of the defendant in error, which is to the effect that he had been informed by Roll that he, Roll, had made arrangements with Mr. Dall by which the latter was to release of record a mortgage held by him against the premises and take instead thereof a second mortgage on the property to be conveyed by plaintiff in error. He testifies explicitly that his only information on the subject is derived from the statement of Roll. When asked if the indebtedness against Roll's property had been paid off at the time a deed was tendered on the 8th day of February he testifies: "I do not know. It may have been paid, but I do not know. As I understood at the time that after that Mr. Siemssen was ready to give us a deed and that we were ready to give him the deed to Mr. Roll's property and close the matter up in accordance with what we had previously agreed." It is clear that Roll was not able to convey in accordance with his agreement, and the effect of his default was to discharge plaintiff in error from liability. To warrant a recovery for services in an action by a broker he must have procured a purchaser who was ready and able to complete the purchase. (Mechem on Agency, 966, and authorities cited in note.) It is argued, however, by defendant in error that for the purpose of his compensation the exchange of property was consummated upon the execution of the written agreement set out above. We have no occasion to determine from the authorities the general rule, since it is clear to us from the evidence in the bill of exceptions that the understanding of the parties was that his compensation depended upon an execution of the contracts between the plaintiff in error and Roll. For instance, on the 8th day of March he addressed to plaintiff in error the following note:

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"As Mr. Roll is willing to close up the trade in accordance with the agreement, and you have refused to do so, I shall insist on my commission, as I fairly earned it. Please send me check for \$200 and oblige

"Yours truly,

W. R. HOMAN."

Had Roll been able to convey in accordance with the terms of his agreement, defendant in error would have been entitled to his compensation notwithstanding the refusal of the plaintiff in error, but having failed to procure a customer able to complete the purchase of the property, he cannot recover, and the judgment of the district court is

REVERSED.

THE other judges concur.

FERDINAND RUBE V. CEDAR COUNTY ET AL.

[FILED DECEMBER 20, 1892.]

Appeal by Taxpayer from Allowance of Claim by County Board: APPEAL BOND: DISMISSAL. Where a taxpayer in good faith attempts to appeal from the allowance of a claim against a county by the county board, and gives an appeal bond which is approved by the county clerk, his appeal will not be dismissed on account of informalities or omissions in the undertaking, but an opportunity will be given to file a new and sufficient undertaking in the district court.

ERROR to the district court for Cedar county. Tried below before NORRIS, J.

B. B. Boyd, and J. C. Crawford, for plaintiff in error.

A. M. Gooding, and Leese & Stewart, contra.

POST, J.

This is a petition in error from the district court of Cedar county, and the material facts as they appear from the record are as follows: The plaintiff in error recovered judgment in the district court of Cedar county for costs in an action of trespass against one William Sullivan. Subsequently the latter filed a claim against the county for the amount of the costs adjudged against him, \$363.69, and for attorneys' fees paid in said action, \$334. The county board allowed the sum of \$588 on said bill, from which order the plaintiff in error, an alleged taxpayer of said county, appealed to the district court. In the district court a motion was made by Sullivan to dismiss the appeal on two grounds. First, because the appellant, plaintiff in error, was not a taxpayer of said county; and second, because no sufficient undertaking had been given. The first ground assigned is not supported by any evidence whatever. The notice of appeal, which is in due form, describes the appellant as a resident elector and taxpayer of said county. This allegation is sufficient to give the district court jurisdiction. There is no provision of statute for making up of issues in the district court in cases appealed from the county boards. It is customary to try them without pleadings, and an appeal should not be dismissed upon the bare assertion of the adverse party that the appellant is not a taxpayer. The undertaking is as follows:

"Whereas on the 16th day of April, 1890, the board of county commissioners of said county allowed to said Wm. Sullivan against said county an order of \$588 on the general fund before said board of commissioners in above cause of action the sum of \$588 costs and attorneys' fees, and the said Ferdinand Rube intends to appeal said cause to the district court of Cedar county. Now, whereas I, Ferdinand Rube, do promise and undertake to the said county of Cedar in the sum of one hundred dollars, that the said

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Ferdinand Rube will faithfully ——— such appeal and pay all costs that may be adjudged against him, and shall prosecute his appeal to effect and without unnecessary delay, and that said appellant will, if judgment be adjudged against him on appeal, will satisfy all costs adjudged against him.

ALBERT ERDENBERGER.

“B. B. BOYD,

“Surety approved by me this 25th day of April, 1890.

“[SEAL.]

FRANS NELSON,

“*County Clerk.*”

This undertaking, although informal, is not void. The proceedings, while irregular, were sufficient to give the district court jurisdiction. The plaintiff in error appears to have acted in good faith and should have been given an opportunity to file a new and sufficient bond. The district court erred in dismissing the appeal and the judgment is

REVERSED.

THE other judges concur.

| | |
|-----|-----|
| 35 | 898 |
| 144 | 744 |
| 35 | 898 |
| 45 | 476 |
| 35 | 898 |
| 46 | 12 |
| 46 | 15 |
| 46 | 151 |
| 46 | 604 |
| 35 | 898 |
| 54 | 629 |
| 35 | 898 |
| 57 | 773 |
| 57 | 774 |

DANIEL D. JOHNSON ET AL. V. CHARLES A. BOUTON.

[FILED DECEMBER 21, 1892.]

1. **False Imprisonment: POWER OF COUNTY JUDGE TO PUNISH FOR CONTEMPT: DISOBEDIENCE OF INJUNCTION ALLOWED BY COUNTY JUDGE IN ACTION PENDING IN DISTRICT COURT.** A county judge has no power to commit for contempt one guilty of disobedience of an injunction allowed by him in an action in the district court. In such case the contempt is against the district court whose order is defied and not the county judge. MAXWELL, CH. J., dissenting.
2. ———: **DEFINITION.** False imprisonment is the unlawful restraint of a person without his consent either with or without process of law.

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3. ———: **MALICE.** The question of malice in an action for false imprisonment is immaterial, except so far as it affects the measure of damage.
4. ———: **WHO LIABLE.** All persons who directly procure, aid, or assist in the unlawful detention are liable as principals.
5. ———: **PROOF OF CONSPIRACY UNNECESSARY.** It is not necessary to prove a conspiracy to unlawfully imprison, in order to entitle the injured party to recover.

ERROR to the district court for Scott's Bluff county.
Tried below before CHURCH, J.

Lot L. Feltham, and J. M. King, for plaintiffs in error.

• *Greene & Hostetler, and M. J. Huffman, contra.*

Post, J.

This was an action for false imprisonment in the district court of Scott's Bluff county, in which defendant in error, plaintiff below, recovered judgment. The material facts in the case are as follows: Johnson, one of the plaintiffs in error, commenced an action in the district court of said county against defendant in error Bouton, seeking to restrain the latter perpetually from diverting the water from Winter's creek, a water-course of said county, to the damage of his (Johnson's) land. In the absence of the district judge therefrom, King, another of the plaintiffs in error, as county judge, allowed a temporary injunction in said case. Subsequently, and while said action was still pending, Johnson, with Feltham, his attorney, appeared before King and charged Bouton with violating the said order of injunction and caused an order to be issued for his (Bouton's) arrest. Subsequently Bouton, who had in the meantime been arrested by virtue of the order aforesaid, was given a hearing by King and adjudged to be in contempt of court. He was accordingly sentenced to pay a fine of \$30, and costs, and ordered to give bond in the

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sum of \$300, conditioned that he would in the future obey said injunction. Failing to satisfy said judgment, or give the required bond, he was by the order of King committed to the custody of the plaintiff in error, Fanning, as sheriff, by whom he was detained eight days. During said time he was in the custody of a deputy sheriff and boarded at the village hotel, except about twelve hours, during which time he was confined in jail. He subsequently commenced an action for damage against Johnson and Feltham, his attorney, King, the county judge, and sureties on his official bond, and Fanning, the sheriff and sureties. On trial in the district court he recovered judgment in the sum of \$100 against all the defendants therein except the sureties of King and Fanning, which is the judgment we are called upon to review.

The first and most important question presented is that of the jurisdiction of a county judge to punish as for contempt the disobedience of an order of injunction allowed by him in an action in the district court. The authority for the allowing of an injunction by the county judge in such a case is found in section 252 of the Code, viz.: "The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or, in the absence from the county of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto."

The only other sections of said chapter which have any bearing on the subject under consideration are sections 255, 256, 257, and 260, as follows:

"Sec. 255. No injunction, unless provided by special statute, shall operate, until the party obtaining the same shall give an undertaking, executed by one or more sufficient sureties, to be approved by the clerk of the court

granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to have been granted.

“Sec. 256. The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be issued by the clerk. Where the injunction is allowed at the commencement of the action, the clerk shall indorse upon the summons, ‘injunction allowed,’ and it shall not be necessary to issue the order of injunction; nor shall it be necessary to issue the same, where notice of the application therefor has been given to the party enjoined. The service of the summons so indorsed, or the notice of the application for an injunction, shall be notice of its allowance.

“Sec. 257. Where the injunction is allowed during the litigation, and without notice of the application therefor, the order of injunction shall be issued, and the sheriff forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof, without delay.

“Sec. 260. An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirement, or be otherwise legally discharged.”

The general rule is that the authority to punish for con-

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tempt belongs exclusively to the court in which the contempt is committed. (Hawes, Jurisdiction, sec. 221; Wells, Jurisdiction, p. 180.) In *Rapalje on Contempts*, sec. 13, it is said: "It is a well settled rule that the court alone in which the contempt is committed, or whose order or authority is defied, has power to punish or entertain proceedings to that end." In *Kirk v. Milwaukee D. C. Mfg. Co.*, 26 Fed. Rep., 501, it was held that when a cause is removed from the state court to the circuit court of the United States pending proceedings against one of the parties for contempt in disobeying an order of the former, the circuit court has no jurisdiction in such proceeding on the ground that the contempt was against the state court only. (See also *Passmore Williamson's case*, 26 Pa. St., 9, and *State v. McKinnon*, 8 Oregon, 487.) Mr. Bishop says (2 Bish., Crim. Law, 268): "It may be observed that the very nature of a contempt compels the court against which it was committed, to proceed against it, and if the court has jurisdiction precludes any other or superior tribunal from taking cognizance of it whether directly on appeal or otherwise." The injunction was the process of the district court. It was not effective for any purpose until a bond was given and approved by the clerk of the district court (sec. 255), nor until the order was issued under the seal of the clerk or the summons indorsed, injunction allowed (sec. 256). When issued and served it was under the exclusive control of the district court. Whatever act Bouton may have done in violation of the injunction was an offense against the district court and not the county judge. If such act amounted to a contempt it was a contempt of the former and not the latter. The order which a county judge is authorized to make is in an action in the district court—an order formerly within the exclusive jurisdiction of a court of chancery. When that order is made his jurisdiction ends, unless his further authority clearly appears from the statutes. Jurisdiction of a county judge

to commit for the violation of the orders of a court of equity is an anomaly which should not be sustained upon any doubtful or uncertain grounds. It has been held by this court that proceedings in contempt are in their nature criminal and that the strict rules of construction applicable to criminal proceedings are to govern therein. (*Boyd v. State*, 19 Neb., 128.) With this rule in mind let us examine some other provisions of our statutes on the subject. The general provision on the subject of contempts is found in section 669 of the Civil Code, as follows :

“ Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: *First*. Disorderly, contemptuous or insolent behavior towards the court, or any of its officers, in its presence. *Second*. Any breach of the peace, noise or other disturbance tending to interrupt its proceedings. *Third*. Willful disobedience of, or resistance willfully offered to, any lawful process or order of said court. *Fourth*. Any willful attempt to obstruct the proceedings or hinder the due administration of justice in any suit, proceedings, or process pending before the courts. *Fifth*. The contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and when sworn or affirmed, the refusal to answer any legal and proper interrogatory.”

By the next section it is provided that contempts committed in the presence of the court may be punished summarily, but in other cases the party, upon being brought before the court, shall have a reasonable time in which to make his defense. It will be observed that the power to punish for contempt is by the section quoted conferred, not upon its judges, but upon courts of record. The county court is a court of record in a restricted sense only, viz., while acting within the jurisdiction which it possesses concurrently with the district court. (*Schell v. Husenstine*, 15 Neb., 11.)

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By the constitution, section 16, article 6, it is provided that the county court shall not have jurisdiction in actions in which the title to real estate is sought to be recovered or may be drawn in question. There is no doubt of the power of the county court to enforce its own orders made within its jurisdiction by proceedings in contempt. But the power of a county judge to punish as for contempt the violation of the order or decree of a court of chancery, as in this instance, where the title to real estate was directly involved, cannot be said to be within the spirit of the constitution. To hold that the county court, or the judge thereof, can under our system be authorized to enforce the orders or decrees of a court of equity in such a case by committing the offending party for the violation thereof, appears to the writer to be a direct contravention of the constitution, and would have been strikingly incongruous, to say the least, had such been the clearly expressed intention of the legislature. The provisions of our statute for the allowing of injunctions and punishments for the breach thereof were copied from sections 239 and 247 of the Code of Ohio of 1853. The constitution of 1851, which was then in force in that state, contained no such limitation upon the powers of the probate (county) court as does ours. On the contrary, it was expressly provided by section 8, article 4, after defining the jurisdiction of the probate court as generally exercised by such courts, that it shall have "such other jurisdiction in any county or counties as may be provided by law"; and although substantially the same provision is found in the present Code of Ohio with respect to the allowance and enforcement of injunctions as in ours, there is in the reports of that state no case in which the probate court or judge has committed an offender for the violation of an injunctional order in an action pending in the court of common pleas. So far, therefore, as the practice under the constitution of that state sheds any light upon the question under consideration, it

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tends to confirm us in the view already expressed. For had the practice been for the probate judges to commit for violations of orders such as in this case, it is at least probable that there could have been found some mention thereof in the reports of that state.

That constitutional and statutory provisions upon the same subject should be construed together, and that all statutes should be construed with reference to the common law, are elementary rules of construction which have been repeatedly recognized by this court. By an application of those rules to the question before us it is plain that the literal wording of section 260 must yield to the evident meaning of the several provisions on this subject when construed in the light of the common law. The power, therefore, to punish for the violation of an injunction "by the court or any judge who may have granted it in vacation" is limited to the court or judge *thereof* who may have allowed the order in question.

Exceptions were taken to a number of instructions which need not be noticed, since they all state in different language the one proposition already considered, viz., that the county court had jurisdiction in the proceeding against the defendant in error for contempt.

Among the instructions refused are several containing the same proposition as the following: "In an action of false imprisonment it is incumbent upon the plaintiff to prove by a preponderance of evidence that the original prosecution was without probable cause and was malicious." These instructions were properly refused. False imprisonment is the unlawful detention of the injured party. (Am. & Eng. Encyc. of Law, vol. 7, 662.) The question of malice is immaterial except so far as it affects the measure of damage. (*Comer v. Knowles*, 17 Kan., 436.) *Casebeer v. Rice*, 18 Neb., 203, relied upon by plaintiff in error, was an action for malicious prosecution and, therefore, not applicable.

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Other instructions were refused which were intended by plaintiffs in error as a definition of a conspiracy. There was no error in refusing them. It was not necessary to prove a conspiracy. (*Painter v. Ives*, 4 Neb., 122; *Fenelon v. Butts*, 53 Wis., 344.) The rule is that any one who aids or assists in the unlawful imprisonment of another is chargeable as a principal. (7 Am. & Eng. Encyc. of Law, 679, and authorities cited in note.)

Lastly, it is insisted that the damages are excessive. The evidence discloses the fact that defendant expended \$40 for the services of counsel in order to secure his discharge. He was detained in custody at least eight days, and was during said time imprisoned in the jail of the county twelve or thirteen hours. The verdict, \$100, does not appear to be so disproportionate to the wrong as to call for action by this court.

AFFIRMED.

NORVAL, J., concurs.

MAXWELL, CH. J., dissenting.

I am unable to agree to the majority opinion for the following reasons: The proof clearly shows that the action was pending in the district court and that the district judge was absent from the county, and that the order of the county judge granting an injunction was valid. The sole question presented is, Has the county judge authority to punish for the willful violation of an injunction granted by himself?

Section 252 of the Code provides: "The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or, in the absence of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." This is a copy of the first

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part of section 239 of the original Ohio Code, with the exception of the words "district court," which in the Ohio Code are "the court of common pleas." (Seney's Code, p. 239.)

Section 253 of the Nebraska Code provides: "If the court or judge deem it proper that the defendant, or any party to the suit should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may in the meantime restrain such party." This is section 240 of the original Ohio Code.

Section 260 of the Nebraska Code is as follows: "An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or *by any judge who may have granted it in vacation*. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding \$200, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or in default thereof, he may be committed to close custody until he shall fully comply with such requirement, or be otherwise legally discharged." This is a copy of section 247 of the original Ohio Code.

In looking through the reports of that state we have been unable to find a single case in which it was held that a judge who granted an injunction could not punish for a violation of the same. There is but little doubt violations of injunctions issued by county judges have taken place in that state and been punished by such judges, but if so, the plain language of the statute was held to be a sufficient warrant for such arrest and punishment, hence the cases were not taken to the supreme court. Under our statute the district court has jurisdiction to punish for a violation

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of an injunction in a case pending in the court. If the statute stopped here, it would not be seriously contended that a judge could punish such violation. The language of the statute, however, is plain and unequivocal: "Disobedience of an injunction may be punished as a contempt by the court, or by any judge who may have granted it in vacation." If any judge who may have granted it in vacation may punish for a violation of the same, certainly a judge who was duly authorized and did grant it in vacation has authority to punish for a violation thereof. The punishment for a contempt is not based alone upon the disrespect shown the judge who granted the writ, but principally because the disobedience of the order interrupts the due administration of justice. This being so, it is necessary that the power to protect the order of injunction while it continues in force should remain in each county to be exercised as occasion may require. Suppose an individual or some of the great corporations should desire certain property for right of way or other use, in the county where the cause originated, or any other county in which no judge of the district court resides, and the property owner should obtain an injunction from the county judge against the appropriation of his property. In such case, as the county judge had no power to arrest and punish for a violation of the injunction, the owner of the property is practically without a remedy to prevent a violation of his rights. Suppose a railway was about to be built on a public street in front of the plaintiff's residence, or through his residence, causing a removal thereof, without complying with the law giving the company that right, and an order of injunction was obtained from the county judge, which it disregarded and went on and completed the work, the property owner would be practically without remedy. It is true he could recover damages after an expensive and exhausting litigation with a powerful opponent, but that is not an *adequate* remedy, and places the owner of the prop-

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erty taken to quite an extent at the mercy of his antagonist. There are many other wrongs liable to occur in any county where the means of preventing the same are taken away. The statute provides an adequate remedy to prevent the wrong, which is available to every person, be he rich or poor. In a late case the court held that the county court had equity jurisdiction in cases arising out of probate matters, and the same rule, no doubt, applies in cases of injunctions. An examination of the constitution of Ohio and that of Nebraska will show no substantial difference as to the power conferred in this respect on the county judges.

Giving the words of the statute their plain natural meaning, a county judge has authority to punish the violation of an order of injunction, lawfully granted by him, and this, so far as the writer is advised, has been the construction placed on these words by the courts and bar of the state for a third of a century. Cases analogous to this frequently arise in those states where a temporary order of injunction is granted by a circuit court commissioner. Thus in *Nieuwankamp v. Ullman*, 47 Wis., 168, an order of injunction had been granted by a circuit court commissioner against an insolvent debtor to restrain him from disposing of his property. The order being violated, the court held that the commissioner could punish for a violation of the order, but that the court possessed the power also. The matter is discussed in *Haight v. Lucia*, 36 Wis., 355, in which it was held that in certain cases where the statute authorized it, a circuit court commissioner *could punish* for contempt. The Wisconsin statute is as follows: "Every court commissioner may issue subpoenas for witnesses, and attachments and other process to compel their attendance, administer oaths, take depositions and testimony in civil actions, when authorized by law, or by rule or order of any court having jurisdiction of such actions, and return and report such depositions and testimony; take and certify the ac-

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knowledgments of deeds and other instruments in writing, state accounts between parties referred to him by order of court, determine upon the amount and sufficiency of bail, allow writs of *habeas corpus* and *ne exeat*, and grant injunctive orders; and may exercise within his county the powers of a circuit judge at chambers, in any civil action pending in such county, except as otherwise provided by law; and may do such other things as he may be authorized by law to do, and perform such other duties as may be required of him by the circuit court, or as are necessary and proper for the full exercise of the powers hereby granted; subject to review in all cases by the circuit court, as provided by law and the rules and practice of the court."

Also, after providing for the examination of a debtor under oath before a circuit court commissioner, and where there is danger that the debtor will leave the state, authorizing the debtor's arrest and imprisonment, it is further provided in case "he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more sureties, that he will from time to time attend before the judge or court commissioner as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge, or court commissioner as for a contempt."

In this case it is distinctly held that a circuit commissioner, although his powers are much less than those of a county judge, may punish for the violation of an injunctive order issued by him, although the circuit courts also possessed that power. It is very clear to my mind that the county judge had jurisdiction and that the judgment should be reversed.

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2. In such a case the judgment will not be reversed because the court gave an erroneous instruction on question of contributory negligence, its giving being error without prejudice. *Id.*

Conversion. See CHATTEL MORTGAGES, 1.

1. When a mortgagee, in foreclosing a chattel mortgage, sells more property than is sufficient to satisfy the debt and costs, he will be liable for conversion of such excess. *Omaha Auction & Storage Co. v. Rogers* 61
2. The owner of converted goods does not bar his right of action for the original wrongful taking by receiving back the goods or a portion thereof, or accepting the proceeds arising from their sale, but such facts may be shown in mitigation of damages. *Watson v. Coburn* 492
3. In an action for conversion it is no defense to show that the property has been taken from the wrong-doer by a third party, by legal process or otherwise, unless the original owner has received, or had the benefit of the proceeds thereof, where the same has been sold. *Id.*

4. In an action by a mortgagee for conversion against a sheriff who has levied on the property at the suit of a creditor of the mortgagor, the plaintiff is entitled to receive as damages the actual market value of the property at the time of the conversion, with interest from that date, less the market value of that portion of the property subsequently recovered or the proceeds of which plaintiff has had the benefit, and not exceeding the amount remaining unpaid on the mortgage. *Id.*
5. In an action by a chattel mortgagor against the mortgagee for conversion of the property, where the defendant justifies under a provision in the mortgage authorizing him to take immediate possession when he felt insecure, he may prove any facts tending to show the conduct of the mortgagors in regard to the chattels, but cannot prove mere rumors or reports. *Rector-Wilhelmy Co. v. Nissen*..... 716
6. In such a case it is proper to instruct the jury, if they find for plaintiff, to disregard the evidence of what the goods sold for at forced sale, in arriving at the value of the property. *Id.*
7. Instruction on measure of damages set out in opinion approved. *Id.*

Conveyances. See DEEDS. VENDOR AND VENDEE.

Conveyances to Relative. See FRAUDULENT CONVEYANCES.

Corporations.

1. Unless otherwise provided, the whole amount of capital fixed by a subscription contract must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of a subscriber to recover an assessment on the several shares. *Hards v. Platte Valley Improvement Co*..... 263
2. In an action upon a contract of subscription to stock, where there is testimony tending to show that defendant waived the conditions in respect to amount of stock to be subscribed before entering upon the main purposes of the corporation, it should be submitted to the jury. *Id.*
3. In an action to recover a subscription to capital stock the defendant will not be released because the board of directors passed a resolution to drop from the list of stockholders the names of delinquent subscribers, where the evidence shows that such action was not taken, that defendant was not excluded from participating in the management of the corporation, and that he subsequently

obtained a reduction from the amount of a purchase from the company on account of his membership. *Hays v. Franklin County Lumber Co.*..... 512

Corroborating Evidence. See WITNESSES, 3.

Costs. See DISMISSAL.

1. Will be taxed to the party at fault where copies of unnecessary papers are included in the transcript for review in supreme court. *Streitz v. Hartman*..... 406
2. The costs of suit will be taxed against the county in an action where a writ of *mandamus* issues against the county commissioners to compel them to call an election for the relocation of the county seat. *State v. Crabtree* 106
3. In an action by a principal against an agent for an accounting, where the defendant denied that he was indebted to plaintiff, and that he had accounted for all matters in controversy before the suit was brought, and defended on the theory that nothing was due from him, the plaintiff was not required to prove a demand for an accounting in order to entitle him to recover costs. *Carlson v. Beckman*, 392
4. In such a case a judgment for less than \$200 will not alone prevent a recovery for costs by plaintiff since a justice of the peace has no jurisdiction. *Id.*

Counter-Claim.

Not pleaded before a justice of the peace will be stricken from the answer on trial of appeal to district court. *Carr v. Luscher* 318

Counties. See AGRICULTURAL SOCIETIES, 2. APPEAL, 11.
COUNTY TREASURER.

The boundaries of an organized county cannot be lawfully changed so as to add to such county adjoining unorganized territory, unless a majority of the inhabitants of such territory so petition the county board of the county to which it is proposed to be added, nor unless the proposition has received the sanction of a majority of the voters of such county at an election duly called and held therein for that purpose. *Wayne County v. Cobb*..... 231

County Board.

Will not be required by *mandamus* to let the publishing of the delinquent tax list to the lowest bidder. *State v. Lincoln County*..... 346

County Clerks. See ELECTIONS, 1, 2.

County Commissioners. See COUNTY SEAT.

County Court. See INJUNCTIONS.

1. The constitution does not prohibit the conferring upon the county court of equity jurisdiction except as to the subjects enumerated in sec. 16, art. 6. *Wilson v. Coburn*..... 530
2. The funds of an insolvent debtor which come into the hands of an assignee are within the jurisdiction of the county court, which has authority to determine the rights of the creditors thereto and grant proper relief, subject to the limitations of the constitution. *Id.*

County Judge. See ATTACHMENT, 5, 8, 12. JUDGMENTS, 7.**County Seat.**

Mandamus will issue against county commissioners to compel them to call a special election for the relocation of the county seat under sec. 1, art. 3, ch. 17, Comp. Stata., upon their unlawful refusal to do so after the petition provided by law has been presented to them. *State v. Crabtree*..... 106

County Superintendent. See MANDAMUS, 6. SCHOOL DISTRICTS.**County Supervisors. See AGRICULTURAL SOCIETIES, 2.**

It is the duty of all present to vote on every proposition properly before the board, and those present who do not vote are to be counted in making up the aggregate of the votes. *Township of Inavale v. Bailey*..... 456

County Treasurer. See TAX LIENS, 2.

Is not entitled to fees on moneys paid to him by township treasurers. *Taylor v. Kearney County*..... 381

Courts. See COUNTY COURTS. DISTRICT COURTS. JUSTICE OF THE PEACE. SPECIAL TRIBUNAL.**Covenant. See LANDLORD AND TENANT, 6.****Covenant of Warranty.**

1. An action for damages for breach of covenant of warranty is for a debt arising under a contract, which may be recovered by attachment. *Cheney v. Straube*..... 521
2. A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. *Id.*
3. A cause of action accrues to covenantee on his covenant of warranty, or for quiet enjoyment, upon eviction by the purchaser under a prior mortgage. *Id.*
4. In an action for the breach of a covenant of warranty by the covenantee, after eviction under a paramount title, it is

sufficient to allege in general terms an eviction under a title paramount to that of the covenantor. *Id.*

5. One who voluntarily surrenders to a third party asserting an adverse title must, in an action against his covenantor for breach of warranty, establish the validity of the title he has recognized. *Id.*..... 522
6. The measure of damages for breach is the consideration paid for the land, with interest, and costs and expenses incurred in the suit by which the covenantee is evicted; and if the latter is obliged to purchase an outstanding title in order to protect his own, he may recover the amount paid for such paramount title, not exceeding the consideration paid by him. *Id.*

Creditor's Bill. See FRAUDULENT CONVEYANCES. NEGOTIABLE INSTRUMENTS, 3.

Criminal Law. See EMBEZZLEMENT. LARCENY. LIBEL.

1. A district court has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it and substitute for it another sentence at the same term of court, and in such a case the last sentence is a nullity. *In re Jones*499, 502
2. In order to warrant a conviction on circumstantial evidence the evidence must be of so conclusive a character as to prove beyond a reasonable doubt that the accused, and no other person, committed the offense charged. *Kaiser v. State*..... 704

Criminal Libel. See LIBEL.

Cross-Examination. See WITNESSES, 2.

Cumbering Record.

Costs of unnecessary parts of record in transcripts for review will be taxed to the party at fault. *Streits v. Hartman*... 406

Curtesy. See LIFE ESTATE.

Custom and Usage. See USAGE.

Damages. See ATTACHMENT, 11. CONTRACTS, 2. CONVERSION, 2, 4, 7. COVENANT OF WARRANTY, 6. EMINENT DOMAIN. LIQUORS. NEGLIGENCE.

1. A verdict for \$2,000 was not excessive damage for personal injuries to a healthy boy ten years of age, resulting from being kicked by his step-father, where the proof showed that the boy's spine was permanently injured and caused constant pain and unfitted him for hard labor. *Wohlenberg v. Melcher* 804

2. Where a building is not erected within the time limited by the contract through the contractor's default or neglect, the owner is entitled to recover damages. In the trial of such a case it is not error for the owner to prove that the building had been leased for a stipulated sum, and that the tenant was to take possession as soon as the work was completed, when it is shown that the reasonable rental value exceeded the amount of rent reserved by the lease. *Consaul v. Sheldon*..... 247

Death by Wrongful Act. See CONTRIBUTORY NEGLIGENCE.
MUNICIPAL CORPORATIONS, 1.

1. Under sec. 2, ch. 21, Comp. Stats., in an action against a railroad company for wrongfully causing the death of plaintiff's intestate, where the proof shows that the next of kin was not pecuniarily injured by the death of the intestate, the plaintiff is only entitled to recover nominal damages. *Anderson v. C., B. & Q. R. Co.*..... 102
2. In case of a verdict in favor of the plaintiff, in an action against a railroad company for wrongfully causing the death of plaintiff's intestate, he is entitled to recover such a sum as the jury may deem from the evidence a fair and just compensation to the next of kin, for the pecuniary loss resulting from the death which is made the basis of the suit, not exceeding the statutory amount. *Id.*..... 96

Deceit. See MARRIAGES, 2. SALES.

Declarations. See EVIDENCE, 10.

Decrees. See JUDGMENTS.

1. The recitals of the record are conclusive upon the parties as to the term at which a decree was rendered. *State v. Hopewell*..... 823
2. Record entry may be changed by district court after term to correspond to the decree pronounced. *Hoagland v. Way* 387
3. The taking of a stay of order of sale is not a waiver of the right to apply to district court to correct record entry of decree. *Id.*..... 388
4. Cannot be assailed for mere irregularities by parties who appeared in the suit, to defeat confirmation of sale under a mortgage foreclosure. *Stratton v. Reisdorph*..... 314

Deeds. See ACKNOWLEDGMENT. MORTGAGES, 10.

1. Proof of recording where records have been destroyed by fire. *Deming v. Miles*.....739, 741
2. Identity of the name of a grantor or grantee is *prima facie* evidence of identity of the person. *Rupert v. Penner*..... 587

3. Real estate is sufficiently described in a conveyance when the deed refers for identification to another deed specifically mentioned therein, which contains an accurate description of the property sold. *Id.*
4. Under sec. 53, ch. 73, Comp. Stats., in construing an instrument conveying real estate, where, by any reasonable interpretation, the granting clause and the *habendum* can be reconciled, effect must be given to both. *Id.*
5. Where a deed, properly executed and acknowledged, is filed and recorded in the proper office, it is thenceforth notice to all the world, even though the record book containing it may be totally destroyed by fire. *Deming v. Miles* 739
6. When a deed, which is beneficial in its character to the grantee named therein is properly acknowledged and recorded, the presumption of law is that it was delivered by the grantor and accepted by the grantee. *Bowman v. Griffith*..... 361
7. Where a deed, beneficial to the grantee, recites that it is executed for the purpose of correcting an error in a prior deed between the same parties, the record thereof is evidence of the facts therein recited. *Id.*
8. Filing a deed properly executed and acknowledged for record with the proper recording officer is constructive notice to all subsequent purchasers and mortgagees, although the officer may fail to comply with the requirements of the statute with respect to recording it. *Deming v. Miles*, 739
9. The proper recording of an absolute deed given and intended as a mortgage, where the contract to reconvey rests in parol, is constructive notice of the interest of the grantee. Such lien is superior to a mechanic's lien for materials furnished under a contract entered into with the grantor after the recording of such deed. *Livesey v. Brown* 112
10. The premises of a deed were "do hereby grant, sell, and convey unto J. P. C." The *habendum* clause was "to have and to hold said premises, with the appurtenances, unto the said J. P. C. for and during the term of his natural life, and at his decease the same shall descend in equal shares to his children," naming them. *Held*, That the deed conveyed a life estate to J. P. C., with remainder to his children therein mentioned. *Rupert v. Penner*..... 588
11. In the body of a deed and in the certificate of acknowledgment the grantor was correctly described as Archibald T. Finn. The deed was signed as Arch. T. Finn. The

certificate of acknowledgment identified the party mentioned as grantor as known to the officer to be the person whose name is affixed to the instrument and who executed the same. *Held*, That it sufficiently appeared that "Archibald T. and Arch. T." were one and the same person. *Id.*, 587

Defect of Parties. See ERROR PROCEEDINGS.

Deficiency Judgment. See VENDOR AND VENDEE, 2.

Definitions. See WORDS AND PHRASES.

Delinquent Tax List.

May be published in the newspaper designated by the county board. *State v. Lincoln County* 346

Delivery. See DEEDS, 6.

Demand. See COSTS, 3, 4. LANDLORD AND TENANT, 5.

Demurrer.

A misjoinder of parties plaintiff is not a cause for demurrer. *Lancaster County v. Rush*..... 120

Depositor. See BANKS AND BANKING.

Descent. See MORTGAGES, 10.

Description. See DEEDS, 3. EJECTMENT, 8. FORCIBLE ENTRY AND DETAINER, 1. JUDICIAL SALES, 2.

Diminution of Record. See APPEAL, 4.

Directing Verdict. See NEGLIGENCE, 6. TRIAL, 3, 7.

Discovery.

An order for the examination of a witness should not be made without notice. *Farrington v. Stone*..... 459

Discretion of Trial Court. See EVIDENCE, 1, 17. REVIEW. 27, 35. WITNESSES, 2.

Dismissal. See APPEAL, 1, 3, 9, 11.

Where an action is dismissed for want of prosecution, and the plaintiff gives a valid excuse for a failure to pay costs, the court will not compel such payment as a condition of permitting the second action to proceed. *U. P. R. Co. v. Mertes* 204

District Court.

1. Has jurisdiction in case of contested election in relation to township organization. *Albert v. Twohig*..... 563
2. Has power to correct a mistake in the record entry of a decree at a term subsequent to that at which it was rendered so as to make the same correspond to the decree

actually pronounced, and to conform to the pleadings in the case. *Hoagland v. Way*..... 387

3. May hold terms at the same time in different counties of the same district, and, when necessary, the court sitting in any county may be continued into and held during the term fixed for holding such court in any other county in the district, or may be adjourned and held beyond such time. *Tippy v. State* 368

Dogs. See ANIMALS, 1-3. MALICIOUS MISCHIEF.

Domestic Judgment. See JUDGMENTS, 1.

Drafts. See NEGOTIABLE INSTRUMENTS, 1, 5.

Drunkenness. See LIQUORS 3.

Ejectment. See ADVERSE POSSESSION. JOINDER OF ACTIONS.

1. The plaintiff must possess a legal estate to maintain ejectment. *Malloy v. Malloy* 224
2. A mortgagee cannot maintain ejectment to recover possession of real estate. *Id.*
3. Evidence held not sufficient to entitle the defendant in ejectment to recover for taxes paid by third parties. *Fletcher v. Brown* 660
4. Evidence held to sustain the finding of the trial court as to the value of improvements made by an occupying claimant. *Id.*
5. Under a general denial the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. *Staley v. Housel*..... 160
6. It is not error to allow a plaintiff out of possession to amend his petition to quiet title so as to state a cause of action in ejectment. *Homan v. Hellman*..... 414
7. Under a general denial a defendant may prove, by any legal evidence which he may have, any fact which will defeat the plaintiff's cause of action. *Staley v. Housel*..... 160
8. A description in the petition by metes and bounds, commencing at the southeast corner of the northwest quarter of the northwest quarter of a specified section, town, and range, is sufficient. *Mills v. Traver*..... 292
9. Permitting the introduction in evidence of records of deeds duly recorded for the purpose of proving title, instead of requiring the production of the originals, rests largely in the discretion of the trial court. *Rupert v. Penner*..... 587
10. Defendant in possession under title bond from holder of tax deed cannot recover taxes paid by the person whose

- title bond he holds without a special assignment. *Fletcher v. Brown*..... 660
Carter v. Brown..... 673
11. A party who holds under a contract for the purchase of real estate is not in law deemed possessed of a legal estate in the premises, and unless authorized by statute, cannot maintain ejectment. *Malloy v. Malloy*..... 228
12. Where an occupant of real estate is allowed for valuable and lasting improvements, the measure of his recovery is the amount such improvements add to the value of the premises. Evidence of cost of improvements, irrespective of their effect upon the value of the land, is inadmissible. *Fletcher v. Brown*..... 660
13. To entitle defendant on eviction to recover under the occupying claimants' act for improvements, and taxes paid while in possession, it must appear that the improvements were made and money expended while he was in good faith claiming title derived from some public office, or from the state or the United States. *Carter v. Brown*..... 670
14. Where the defendant's only title was derived from a title bond executed by the holder of void tax deeds, he was not entitled to recover in ejectment by the owner, under the occupying claimants' act, for improvements and taxes, in the absence of evidence that his possession was by virtue of said bond, or that the expenditures were made while he was in good faith relying upon his title thereby acquired. *Id.*
15. Where in action of ejectment it appears that the conveyance by which plaintiff holds title was given as security for advancements of money which the grantor had agreed to repay, the defendant in possession, as heir of such grantor, will be required to pay the sum due plaintiff, and a decree of foreclosure and sale for the amount due should be entered in plaintiff's favor. *Malloy v. Malloy*..... 224
16. Damages for rents and profits may be recovered in an action of ejectment for the statutory period, prior to service of summons. The special provision of the occupying claimants' act, ch. 63, Comp. Stats., applies only to rents and profits subsequent to service of summons in ejectment. *Fletcher v. Brown*..... 660
17. Whether such special provision is exclusive as to damages for rents and profits subsequent to the service of summons or concurrent only, *query. Id.*

Elections.

1. Under sec. 20, ch. 26, Comp. Stats., it is no part of the

duty of judges and clerks of election to certify that certain persons received a specified number of votes as democrat and a certain number as people's independent, or otherwise, and such certification has no force or effect.

State v. Stein..... 848

2. Under sec. 46, ch. 26, Comp. Stats., it is the duty of a county clerk, with two disinterested electors, to make abstract of the votes cast for members of the legislature, and under sec. 48, ch. 26, the clerk is required to make out a certificate of election to the person having the highest number of votes, but he has no authority to classify the votes cast for a candidate as people's independent, democratic, or otherwise. *Id.*
3. The district court has jurisdiction in case of contested election in relation to township organization. *Albert v. Twohig*..... 563
4. The ballots cast constitute the primary evidence in such a case to determine the rights of the respective parties. If they have been placed in a position to be tampered with by interested parties the burden of proof is on the party offering them in evidence to show that they have been properly preserved. *Id.*

Embezzlement.

1. In a trial of the defendant for embezzlement of pianos, evidence tending to prove that he claimed to be absolute owner of the instruments, that he received them as agent and converted them to his own use with a fraudulent intent, by pledging them for borrowed money and by transferring them by bill of sale, is sufficient to sustain a verdict of guilty. *Morehouse v. State* 647
2. An agent who, having received property of another to sell on commission on certain prescribed terms, fraudulently, and without the knowledge and consent of the owner thereof, pledges it for money borrowed by the agent for his own use and benefit, with the intent to deprive the owner of his property, is guilty of embezzlement. *Id.*.... 643

Eminent Domain.

1. The special remedy provided by statute for determining, by condemnation proceeding, the damage to land when a part thereof is taken for right of way purposes by a railroad company, is exclusive. *F., E. & M. V. R. Co. v. Mattheis* 48
2. The judgment of the district court on appeal from an award in a condemnation proceeding for right of way is

conclusive upon the parties thereto as to all matters actually litigated therein, and also as to all matters necessarily within the issues joined, although not formally litigated. *A. & N. R. Co. v. Forney* 607

3. A petition for the appointment of a commission to appraise damages for taking property for right of way, which sets forth that the petitioner desires to acquire a strip 100 feet wide through a particular tract, and refers to an accompanying plat for a more particular description, is sufficient. *F., E. & M. V. R. Co. v. Mattheis*..... 48
4. The construction of a railroad track upon trestle work along an alley and across a street where the benches rest mostly in the alley is a direct injury to adjacent lots, for which the owner is entitled to recover damages in a proceeding to condemn a portion of the lots for right of way. *A. & N. R. Co. v. Forney*..... 607
5. In a subsequent action by the owner of the lots to recover damages for the obstruction of the street, in the absence of evidence to the contrary, the presumption is that the cause of action was included in the judgment in the former proceeding, and is now *res adjudicata*. *Id.*

Equity. See LANDLORD AND TENANT, 6. VENDOR AND VENDEE, 1.

1. A defendant who claims protection as a *bona fide* purchaser of real estate without notice of the plaintiff's equities is required to deny such notice, although not alleged in the petition. *Dailey v. Kinsler*..... 835
2. Where many questions are in dispute between a lessor and lessee beside the mere right of possession, a court of equity will entertain jurisdiction and thus settle all matters between the parties relating to the subject in one action, and prevent a multiplicity of suits. *Haynes v. Union Investment Co.*..... 767

Equity Jurisdiction. See COUNTY COURTS.

Error. See REVIEW. TRIAL.

1. Admission of testimony to prove a fact admitted by the pleadings is error without prejudice. *Consaul v. Sheldon*... 247
2. The failure to except to the ruling of the trial court, to the admission or exclusion of testimony, is a waiver of the error. *Johnson v. Swayze*..... 117

Error Proceedings. See APPEAL. REVIEW.

All parties to a joint judgment should be made parties in supreme court, yet where there is a defect of parties it is too late to raise the objection after the cause is submitted, the

submission being a waiver of absence of proper parties.

Consaul v. Sheldon..... 247

Estoppel. See HOMESTEAD, 2, 3. LANDLORD AND TENANT, 2.

1. On the trial of an appeal by a land-owner from an award of damages, a city cannot urge defects and irregularities in its own proceedings in changing the grade of a street to defeat recovery. *Second Congregational Church Society v. City of Omaha*..... 103
2. Statements of an agent with authority to collect rents and care for property will not be received in disparagement of the title of his principal so as to work an estoppel in favor of one who purchased from a stranger claiming adversely to such principal. *Bowman v. Griffith*..... 362

Evidence. See ATTACHMENT, 9, 13. CONVERSION, 5. CORPORATIONS, 2, 3. DAMAGES, 1. DEEDS, 1. EJECTMENT, 3, 4, 9, 12. ELECTIONS, 4. INSURANCE, 2, 3. LARCENY. NEGOTIABLE INSTRUMENTS, 4-6. REVIEW. TRIAL, 2, 4. TRUSTS, 2. USAGE, 3. WITNESSES, 3.

1. Order of introduction rests in discretion of trial court. *Consaul v. Sheldon*..... 247
2. Held that certain testimony set forth in opinion was improperly rejected. *Cunningham v. Fuller*..... 58
3. Admission of testimony to prove a fact admitted by the pleadings is harmless error. *Consaul v. Sheldon*..... 247
4. The record of a deed correcting a former one is evidence of the facts recited therein. *Bowman v. Griffith*..... 361
5. In the absence of pleadings and proof to the contrary, the laws of another state are presumed to be like our own. *Haggin v. Haggin*..... 376
6. Where offered testimony is excluded, the error, if any, is cured by the subsequent admission of the same evidence. *Consaul v. Sheldon*..... 248
7. Every material allegation of new matter in a pleading not denied by the answer or reply, for the purposes of the action is to be taken as true. *Id.*..... 247
8. The evidence referred to in the opinion is not sufficient to overcome an officer's certificate of acknowledgment of a mortgage on a homestead. *Phillips v. Bishop*..... 487
9. The admission in evidence of copies of records of mechanics' liens, as well as the original liens, was not prejudicial to plaintiffs. *Consaul v. Sheldon*..... 251
10. Declarations of a person in the possession of property, as to title, are admissible evidence against him and all persons claiming under him. *Cunningham v. Fuller*..... 58

11. Evidence that a note has been materially altered after execution is admissible on foreclosure of mortgage securing it under a general denial. *Walton Plow Co. v. Campbell...* 173
12. In an action of ejectment, under a general denial, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. *Staley v. Housel*, 160
13. In an action of replevin against a railroad company, a bill of lading is admissible in evidence, where its genuineness is not denied and the possession of the goods is admitted. *C., B. & Q. R. Co. v. Gustin* 92
14. A person having a general knowledge of the value of household goods may testify as to such value although he may not have dealt in goods of that kind. *Omaha Auction & Storage Co. v. Rogers*..... 61
15. In a cause tried to a jury the admission of opinion evidence which has no legitimate bearing on any matter in issue, and which is prejudicial to the party complaining, is good ground for reversal of the judgment. *Darner v. Daggett* 695, 698
16. In a proceeding for forcible entry and detention the plaintiff may be permitted to prove payment of taxes by one under whom he claims, for the purpose of showing that the claim and possession of the latter is in good faith. *Gallagher v. Connell*..... 517
17. Permitting the introduction in evidence of records of deeds duly recorded, instead of requiring the originals, in ejectment trials for the purpose of proving title rests largely in the discretion of the trial court. *Rupert v. Penner* 587
18. In an action for damages by a wife for loss of means of support resulting from the sale of liquors to her husband, the latter's previous intemperate habits may be considered by the jury as affecting the measure of damages. *Uldrich v. Gilmore* 288
19. A communication through the telephone from Schuyler to Omaha, repeated by the operator at Fremont, an intermediate station, held admissible in evidence in an action for breach of contract in case stated in opinion. *Oskamp v. Gadsden* 7
20. When a defendant moves to dissolve an attachment and makes affidavit that the plaintiff's affidavit for attachment is untrue, the burden of proof is upon the plaintiff to sustain the attachment by a preponderance of the evidence. *Dolan v. Armstrong*..... 339

21. Where a witness has testified on a former trial of the case and his testimony reduced to writing in open court by the stenographic reporter, and the witness is absent from the state, such testimony, if otherwise competent, is admissible in evidence; and an objection "that no sufficient cause has been shown for the reading of that testimony" is not an objection to the mode of certifying the same, and was properly overruled. *City of Omaha v. Jensen*..... 69

Exceptions. See BILL OF EXCEPTIONS. REVIEW.

Executions. See JUDICIAL SALES.

Property in hands of a bailee under agreement to purchase at his election cannot be taken on execution to satisfy a judgment against such bailee, before payment made by him to bailor. *McClelland v. Scroggin*..... 537

Exhibits. See BILL OF EXCEPTIONS, 3, 6.

Factors and Brokers. See REAL ESTATE BROKERS.

False Imprisonment.

1. All persons who directly procure aid or assist in the unlawful detention are liable as principals. *Johnson v. Bowton* 899
2. Is the unlawful restraint of a person without his consent, either with or without process of law. *Id.*..... 898
3. It is not necessary to prove a conspiracy to unlawfully imprison, in order to entitle the injured party to recover. *Id.*..... 899
4. The question of malice in an action for false imprisonment is immaterial, except so far as it affects the measure of damages. *Id.*

Fees. See BENEVOLENT SOCIETIES.

A county treasurer is not entitled to fees on moneys paid to him by township treasurers. *Taylor v. Kearney County*... 381

Findings. See MORTGAGES, 5.

On review in supreme court the presumption is in favor of the correctness of the finding of the trial court, and such finding will not be reversed unless clearly wrong. *Bickel v. McAleer*..... 515

Fire and Police Commissioners. See METROPOLITAN CITIES, 4. STATUTES, 3.

Fire Department. See MUNICIPAL CORPORATIONS, 1.

Fire Insurance. See INSURANCE.

Forcible Entry and Detainer.

1. A description of land in a complaint, as the "N. W. $\frac{1}{4}$ sec-

- tion 20, township 29, range 14 west," is not void for uncertainty. *Devine v. Burleson* 238
2. Where a grantee of real estate, on receiving his deed, takes undisputed possession thereof, by himself, his agent or tenant, causing the premises to be fenced and cultivated, such facts constitute a prior possession which will entitle such grantee, or his tenant, to prosecute one by whom he is dispossessed for forcible entry and detention. *Gallagher v. Connell*..... 517
 3. The plaintiff may be permitted to prove payment of taxes by one under whom he claims, for the purpose of showing that the claim and possession of the latter is in good faith. *Id.*
 4. Instructions set out in opinion, *held* properly given and refused. *Id.*
- Foreclosure.** See CHATTEL MORTGAGES, 1. EJECTMENT, 15. MORTGAGES. TAX LIENS, 1, 3.
- Foreign Laws.**
In the absence of pleading and proof to the contrary the laws of another state will be presumed to be like our own. *Haggin v. Haggin*..... 376
- Forfeiture.** See INSURANCE, 8, 10. LANDLORD AND TENANT, 5.
- Forgery.**
Where the evidence tended to establish the fact that the mortgage was a forgery, a judgment canceling the apparent lien thereof was right. *Capital National Bank v. Williams*..... 410
- Fraud.** See BANKS AND BANKING. SALES. STATUTE OF FRAUDS.
1. The ratification of a deed procured by fraud and undue influence must be with full knowledge of all facts affecting its validity. *Staley v. Housel*..... 172
 2. In an ejectment suit the jury was warranted in finding that the deed of plaintiff's grantor was obtained by fraud and undue influence where the testimony showed that the maker was a drinking man, old, feeble, and childish; that he conveyed the land while sick and delirious, without lawful consideration, to a young, vigorous, and attractive woman, who had unlawfully cohabited with him, and promised to stay with him while he lived, and afterward abandoned him. *Id.*..... 168

Fraud and Misrepresentation.

Instructions set out in opinion *held* erroneous. *Learitt v. Sizer*..... 84

Fraudulent Conveyances.

1. While a transfer of property to a relative by a person liable on a claim, where the effect will be to defeat the payment of the same, will be scrutinized very closely, yet it will be sustained if made in good faith for an adequate consideration. *Farrington v. Stone*..... 456
2. It is not sufficient that the vendor desires to defeat the payment of a claim by the transfer of his property; to render the conveyance fraudulent it must be taken with knowledge, actual or constructive, of the proposed fraud, or there must be a want of consideration. *Id.*

Garnishment. See ATTACHMENT, 5, 7.

General Circulation. See LIBEL.

General Denial. See EJECTMENT.

Governor. See OFFICE AND OFFICERS. CONSTITUTIONAL LAW, 2.

Grade of Streets. SEE MUNICIPAL CORPORATIONS, 2.

Guaranty. See WARRANTY.

A contract of guaranty is assignable and the assignee may maintain an action thereon in his own name. *Weir v. Anthony*..... 936

Habeas Corpus.

A prisoner in the penitentiary under a second sentence pronounced after a former judgment against him upon the same verdict had been vacated without authority of law will be discharged where the first sentence has expired. *In re Jones* 503

Harmless Error. See CONTRIBUTORY NEGLIGENCE, 2. JUDICIAL SALES, 1. REVIEW. TRIAL.

Herd Law. See ANIMALS, 4, 5.

Homestead. See QUIETING TITLE, 2, 3.

1. A mortgage of the homestead of married persons is of no validity as against the homestead right unless signed and acknowledged by both husband and wife. *Whitlock v. Gosson* 829
2. A mortgage executed by a husband, the head of a family, whose wife was at the time insane and an inmate of an asylum in another state, was *held* void as against the homestead right. *Id.*

3. In such a case neither the husband nor wife will be estopped to deny the validity of the mortgage in a foreclosure proceeding. *Id.* 830
4. In such a suit, where the answer puts in issue the validity of the mortgage on the ground of exemption, a decree will not be allowed for the sale of so much of the homestead as exceeds \$2,000 in value, unless the value of the property is alleged by the plaintiff or put in issue by proper pleadings. *Id.*

Husband and Wife. See HOMESTEAD. MARRIAGE.

Identity. See DEEDS, 2.

Impeachment. See ACKNOWLEDGMENT. WITNESSES, 6.

A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent. *Phillips v. Bishop*..... 457

Impounding Animals. See ANIMALS, 4, 5.

Imprisonment. See FALSE IMPRISONMENT.

Improvements. See EJECTMENT, 12-14.

Indemnity Bond. See LOST INSTRUMENTS.

Injunctions.

A county judge has no power to commit for contempt one guilty of disobedience of an injunction allowed by him in an action in the district court. In such a case the contempt is against the district court. *Johnson v. Benton*.... 898

Insanity. See HOMESTEAD, 2.

A son was mentally incapacitated for transacting business. His father assisted him in paying and securing debts, and took possession of certain personal property of the son, under a bill of sale. In an action of replevin by the son to recover the property, the contract, not being for necessities, was held void. *Wilkins v. Wilkins*..... 212

Insolvency. See BANKS AND BANKING.

Instructions. See FRAUD, 1. LANDLORD AND TENANT, 3
LARCENY, 2. TRIAL, 3, 7.

1. A party is entitled to have his case submitted to the jury upon his theory as shown by the evidence. *Cunningham v. Fuller*..... 58
2. An oral instruction directing the jury to "disregard this testimony entirely on this point" where no testimony had been given was not prejudicial error. *Consaul v. Shuldon*..... 258

3. The instructions in an action to recover the value of certain goods sold under foreclosure of chattel mortgage, on questions of value, usury, and conversion, set out in opinion, *held* to be a correct statement of the law. *Omaha Auction & Storage Co. v. Rogers*66-7
4. A paragraph of a charge to the jury should be construed as a whole, and if so construed it correctly states the law, will not be condemned because a detached part thereof, construed by itself, might be subject to criticism. *St. Paul Fire & Marine Insurance Co. v. Gotthelf* 352

Insurance. See BENEVOLENT SOCIETIES.

1. The valued policy act of 1889 is sustained. *German Insurance Co. v. Penrod*..... 273
2. Evidence of freight charges and cost of handling goods destroyed by fire is admissible to show amount of loss. *St. Paul Fire & Marine Insurance Co. v. Gotthelf*..... 358
3. The testimony and conduct of the parties referred to in the opinion clearly established the making and delivery of the policies of insurance. *Star Union Lumber Co. v. Finney* 215
4. After a loss has occurred the insured may assign the right to recover for same without the consent of the company, and the assignee may recover in his own name. *Id.*
5. An agent with authority to issue a policy has power to authorize an assignment of so much thereof as would cover a mortgage named in the application. *German Insurance Co. v. Penrod*..... 273
6. A finding of arbitrators that includes only a stock of goods as it appeared after the fire, and makes no reference whatever to the value before, is merely an invoice and not an award. *St. Paul Fire & Marine Insurance Co. v. Gotthelf*.....352, 358
7. The provision in a policy of insurance, that the company shall have sixty days in which to pay the loss, is personal and may be waived by it. It is merely a provision that during the time stated it shall not be liable for costs. *Star Union Lumber Co. v. Finney*..... 215
8. Where there is a default in paying assessments and the company does not declare the policy forfeited, but continues to make further assessments as losses occur, it will be a waiver of the cause of forfeiture. *Farmers Union Insurance Co. v. Wilder* 573
9. A company waives the provision of a policy for notice within a specified time, where part of a stock of goods has

- been destroyed, by demanding and taking possession of the remainder of the goods and books of the insured and endeavoring with the latter to ascertain amount of loss. *St. Paul Fire & Marine Insurance Co. v. Gotthelf*..... 351
10. Under the provisions of a policy reserving to the company the right to cancel the risk at any time by returning the premium *pro rata* for the unexpired term, the company cannot rescind the policy without notice to the insured and payment of the unearned premium. *German Insurance Co. v. Rounds*..... 752
11. A petition alleging the execution and delivery of the policy, destruction of the buildings by fire, loss, that plaintiff was not negligent and that he had performed all the conditions of the policy to be performed by him, was held to state a cause of action without alleging that the damages had not been paid. *Hanover Fire Insurance Co. v. Schellak*, 701
12. The company was not prejudiced by an innocent misstatement of the title by the insured in his proof of loss where he had an insurable interest in the property, and the proof of loss would have been equally available had the insured stated therein the actual facts as to his ownership. *Star Union Lumber Co. v. Finney*..... 215
13. Where premium notes have been given to a mutual insurance company, assessments to be made thereon from time to time as losses occur, in case an assessment is not paid in thirty days after personal demand therefor, or by letter, the company may recover for the whole amount of the deposit note with costs, and executions will thereafter be issued on such judgment as assessments for losses may require. *Farmers Union Insurance Co v. Wilder*..... 572
14. Where a loss occurred before the building was completed, in an action upon a policy which stated that the building was occupied by a tenant, it was no defense that the building was unoccupied where the agent had filled out the application for insurance showing that the building was in course of erection, and issued the policy thereon. *German Insurance Co. v. Penrod* 273
15. A local agent who has the power to make a contract of insurance has authority to consent to additional insurance and to accept notice of a change in the risk and of the placing of incumbrances on the property, unless there is some provision in the policy to the contrary. *German Insurance Co. v. Rounds* 752
16. Where such an agent employed a clerk and authorized him to transact business in the agent's name an endorse-

ment by the clerk upon a policy made within the agent's authority, and in which the latter acquiesced, was the act of the agent and was binding upon the company. · *Id.*

17. The indorsement upon a policy by such an agent of his approval of the assignment of a policy is binding upon the company where the policy contains a clause that "no assignment thereof shall be valid unless the same is indorsed thereon and approved by the company, or its regular agent, in writing." *Id.*

Intoxicating Liquors. See CONTRIBUTION. LIQUORS.

Issues in Appellate Court. See APPEAL, 5, 7, 10, 15.

Joinder of Actions.

An action of ejectment may be joined with one to recover rents and profits. *Fletcher v. Brown*..... 660

Joint Tort-Feasors. See CONTRIBUTION.

Journal Entry.

On justice's docket cannot be corrected by order from an appellate court. *Worley v. Shong*..... 312

Judgments. See DECREES. EMINENT DOMAIN, 4, 5. REPLEVIN, 1, 3, 5.

1. An action can be maintained on a domestic judgment. *Eldredge v. Aultman*..... 884
2. Entered by a justice of the peace the day after verdict is void. *Worley v. Shong*..... 312
3. A court of equity will grant relief against a judgment procured by the creditor's fraudulent concealment of facts. *Phillips v. Kuhn*.....195, 196
4. Without a showing of prejudice to plaintiff in error in case stated in opinion the judgment will not be reversed. *McDonald v. Bowman*..... 93
5. Will not be set aside where the testimony is conflicting and does not preponderate in favor of either party. *Oleson v. City of Plattsburgh* 153
Rudolph v. Davis..... 157
6. A decree foreclosing a real estate mortgage is a final judgment upon which the parties to the suit may reply, and any modification thereof without notice is void. *Homan v. Hellman*.. 414
7. An order of a county judge, duly made without fraud or collusion, allowing a claim against the estate of a deceased person, is a final order, and unless appealed from will be conclusive and have the effect of a judgment and not be open to collateral attack. *Yeatman v. Yeatman*... 422

8. Where there is actual personal service of process upon a defendant, as by reading the summons to him in place of serving a copy of the same, and the defendant does not appear and object on that ground, and judgment is rendered against him, it is not open to collateral attack, as the judgment is not void but voidable. *Gandy v. Jolly*... 711
9. Three common carriers united to complete a line for the transportation of goods, and a piano was injured by the intermediate carrier. Judgment, in an action of which the wrong-doer had notice, was rendered against the carrier that received the piano for shipment. In an action by the latter against the carrier guilty of negligence the judgment was conclusive. *M. P. R. Co. v. Twiss*..... 267
10. Attorneys satisfied a judgment for less than the amount named therein. On motion of their client, after the time for taking the cause to the supreme court had elapsed, the satisfaction was set aside on the grounds that the client was the sole owner of the judgment and that the attorneys were without authority to make a compromise. A petition in an action to restrain the collection of the sum in excess of the amount for which satisfaction had been entered, alleging, *inter alia*, that the client owned half the judgment and the attorneys the other half, stated a cause of action. *Phillips v. Kuhn*..... 187

Judicial Sales. See MORTGAGES, 6. REVIEW, 30.

1. A sale will not be set aside for irregularities or errors not prejudicial to the party complaining. *Miller v. Latham*... 886
2. A notice of sale under a mortgage or decree will generally be *held* sufficient if the property be described as in the mortgage or decree. *Id.*
3. A sale will not be set aside on the motion of a mortgagor on the ground that the purchaser has not paid off claims adjudged to be prior liens upon the property sold. *Id.*
4. Evidence examined, and *held* that the value of the property sold by virtue of a decree of foreclosure is not so greatly in excess of the value found by the appraisers as to call for the setting aside of the sale. *Id.*
5. A purchaser at a mortgage foreclosure sale is chargeable with notice of such material facts as the records disclose, and will not be relieved from completing his purchase on account of defective title or prior incumbrances. *Norton v. Nebraska Loan & Trust Co.*..... 466
6. The doctrine of *caveat emptor* applies to all judicial sales, subject to the qualification that the purchaser is entitled

to relief on the ground of fraud or after-discovered mistake of material facts, where he is free from negligence. He is bound to examine the title and not rely on statements of officers conducting the sale. *Id.*

7. The officer conducting is under the control of the court, and it is its duty to see that the advertisement of sale is published in a paper that will give it general publicity so as to invite competition, and that the sale in other respects is fairly conducted. *State v. Holliday*..... 327
8. If the trial court errs in any of its proceedings, its action may be reviewed; but the supreme court will not by *mandamus* direct the officer making the sale to advertise the same in any particular newspaper. *Id.*

Jurisdiction. See ATTACHMENT, 5. COUNTY COURTS.
EQUITY, 2. SPECIAL TRIBUNAL. SUMMONS, 2, 3.

Jury.

1. Where a party waives all objections for cause to the jurors called to try his case, and also his peremptory challenges, he thereby waives a challenge to the array. *Weeping Water Electric Light Co. v. Haldeman*.....139, 142
2. A motion to quash the panel of jurors because not drawn in proportion to the number of electors of the several precincts of a county, verified by an attorney upon mere belief, is not sufficient to justify the court in quashing the panel. *Id.*..... 139

Justice of the Peace. See PLEADING, 14.

1. On the trial of a case in an ordinary action, where the defendant has entered an appearance but is not present at the trial, it will be assumed that the cause of action is denied, and it will devolve upon the plaintiff to prove the same. *Carr v. Luscher*..... 318
2. A judgment entered by a justice of the peace upon the verdict of a jury the day after the verdict was filed was not entered immediately within the meaning of section 1002 of the Code, and the justice had lost jurisdiction at the time the entry was made. *Worley v. Shong*..... 312

Laches.

It is not the policy of the law to enforce stale claims. *Streitz v. Hartman*..... 406

Landlord and Tenant. See EQUITY.

1. A promise by a lessee of real estate to pay all taxes upon the property does not apply to special assessments for the construction of a sewer. *Ittner v. Robinson*..... 133

2. In action upon a lease to recover rent, the defendant alleged that the building was leased for an unlawful purpose, naming it, to which the plaintiff replied that the same defense had been interposed to an action upon other installments of rent, and overruled. *Held*, That the proof failed to establish an estoppel. *Hellman v. Oliver*..... 334
3. An instruction, in substance, that the jury may determine if the house was to be "used for such unlawful purpose," "or other unlawful purposes," is erroneous. *Id.*
4. The unlawful purpose which it is claimed renders the contract illegal and void must be pleaded, and unless so pleaded should not be submitted to the jury. *Id.*
5. In order to work a forfeiture of a lease for non-payment of rent there must be a demand on the tenant for the rent, although such demand may be in the form of a notice to quit. *Haynes v. Union Investment Co.*..... 767
6. A court of equity will protect a tenant in possession of property until he is paid the value of the furniture and fixtures purchased by him under a lease which provided that the lessor should pay for the same upon the expiration of the lease, and before the surrender of the premises, and for that purpose will restrain the landlord from prosecuting a suit for possession. *Id.*.....766, 771

Larceny. See CRIMINAL LAW, 2.

1. Evidence examined, and *held* not to sustain a judgment of conviction for larceny. *Kaiser v. State*..... 704
2. Instruction set out in opinion, on question of possession of stolen property, *held* erroneous. *Robb v. State*.....285, 286
3. Whether the inference of guilt is to be drawn from possession of stolen goods is a question of fact for the jury. *Id.*..... 285

Leading Question. See WITNESSES, 1.

Lease. See BAILMENT. LANDLORD AND TENANT.

- A promise by a lessee of real estate to pay all taxes upon the property does not apply to special assessments for the construction of a sewer. *Ittner v. Robinson*..... 133

Legislature. See CONSTITUTIONAL LAW, 3.

Libel.

1. In the prosecution for a false and malicious libel charged to have been published in the *Kansas City Sun*, a newspaper published and of general circulation in Douglas county, Nebraska, *held*, that to charge a felony the paper must be of general circulation and that the limitation to one county merely charged a misdemeanor. *Koen v. State*, 676

2. In a prosecution for a false and malicious libel it is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published and have a general circulation. *Id.*

Liens. See MECHANICS' LIENS.

Life Estate.

The life estate of a husband as tenant by the curtesy is subject to seizure and sale on execution against him. A tenant by the curtesy may likewise convey his title by deed or mortgage. *Deming v. Miles* 739

Limitation. See APPEAL, 14. BILL OF EXCEPTIONS, 8.

Limitation of Actions. See ADVERSE POSSESSION, 2.

Liquor Dealer's Bond. See PRINCIPAL AND SURETY, 5.

Liquors. See CONTRIBUTION.

1. Defective dealer's bond does not release the principal from liability for damages resulting from sale. *Uldrich v. Gilmore*..... 290
2. Where a dealer's bond contains no provision for the payment of all damages which may be adjudged against him under the license law, no action can be maintained against the sureties thereon for damages resulting from the sale of intoxicating liquors by the principal on the bond. *Id.*.... 288
3. In an action for damages by a wife for loss of means of support resulting from the sale of liquors to her husband, the latter's previous intemperate habits will not defeat a recovery, yet they may properly be considered by the jury as affecting the measure of damages. Defendant's instructions as modified by the court were properly given. *Id.*.....288, 291

Lost Instruments.

Where a negotiable note is lost before it becomes due the court will require the plaintiff to give an indemnifying bond to the maker as a condition of recovering judgment, but where the instrument is lost after it becomes due, no bond ordinarily will be required. *Means v. Kendall*..... 693

Majority Vote. See COUNTY SUPERVISORS.

Malice. See FALSE IMPRISONMENT, 4.

Malicious Mischief.

A dog has a money value which the owner may recover from one who wrongfully and unlawfully kills his dog. *Nehr v. State*..... 638

Mandamus.

1. Will not lie to compel a county board to let the contract for printing the delinquent tax list to the lowest bidder. *State v. Lincoln County*..... 346
2. Lies to compel board of county supervisors to include in its estimate of expenses the amount payable to an agricultural society under sec. 12, ch. 2, Comp. Stats. *State v. Robinson* 402
3. Will lie to compel a school district to pay money due a contractor upon estimates furnished by the architect under a contract for the construction of a high school building. *Gray v. School District of Norfolk* 438
4. Will issue against the auditor of state to compel the issuance of a certificate to a secret benevolent order to transact business in this state, without the payment of fees, under sec. 32, ch. 43, Comp. Stats. *State v. Benton*..... 466
5. Will not issue to require a judge of the district court to fix the amount of a bond for appeal from an order confirming a sale under mortgage foreclosure, where no objection was made to the order. *State v. Doane*..... 707
6. Will issue on the relation of a county superintendent to compel the moderator of a school district to countersign all proper orders drawn by the director on the district treasurer where he has refused to perform such duty. *Montgomery v. State*..... 655
7. The supreme court will not by *mandamus* direct an officer making a sale under a decree of foreclosure of a mortgage rendered in the district court to advertise the same in any particular newspaper. *State v. Holliday*..... 327
8. Will issue against county commissioners to compel them to call a special election for the relocation of the county seat under sec. 1, art. 3, ch. 17, Comp. Stats., upon their unlawful refusal to do so after the petition provided by law has been presented to them. *State v. Crabtree*..... 106

Marriage.

1. Without license does not affect its validity if otherwise legal. *Haggin v. Haggin*..... 376
2. Where a marriage is solemnized before a person professing to be authorized by law to solemnize marriages, and it is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in wedlock, the marriage will be valid, although the person before whom it was solemnized had no authority. *Id.*..... 375

3. In such a case the wife could not recover damages from her husband for fraudulently inducing her to enter into a pretended marriage, but was entitled to have satisfaction of a former judgment for alimony set aside and the judgment reinstated. *Id.*..... 376

Master Commissioners. See JUDICIAL SALES, 7, 8.

Maxims.

1. "Caveat emptor" applies to all judicial sales. *Norton v. Nebraska Loan & Trust Co.*..... 466
2. "Respondeat superior" does not apply to the negligent acts of a member of the fire department of a city. *Gillespie v. City of Lincoln*..... 34

Mayor. See METROPOLITAN CITIES, 2.

Measure of Damages. See ASSAULT. CARRIERS, 3-5. CONVERSION, 4. COVENANT OF WARRANTY, 6. DAMAGES. DEATH BY WRONGFUL ACT. EJECTMENT, 12. FALSE IMPRISONMENT, 4. VENDOR AND VENDEE, 3, 4. For breach of builder's contract. *Consaul v. Sheldon* 247

Mechanics' Liens.

1. The findings of the trial court will not be disturbed on appeal where they are sustained by the evidence. *Herbert v. Keck*..... 508
2. Where the answer to a petition to foreclose a mechanic's lien denies the indebtedness in the full amount claimed, but admits indebtedness, not stating the amount, the plaintiff is entitled to judgment on the pleadings. *Gray v. Elbling*278, 284
3. A person who furnishes any material for the construction of a building by virtue of a contract, express or implied, with the owner thereof, is entitled to a lien thereon for the amount due for the same, upon filing a sworn statement of his account with the register of deeds of the proper county within four months of the time of furnishing such material. *Livesey v. Brown*..... 111
4. Where an absolute deed, properly executed and acknowledged, is given and intended only as a mortgage, and the contract to reconvey rests in parol, the proper recording of the instrument is constructive notice of the interest of the grantee in the property therein described. Such lien is superior to a mechanic's lien for materials furnished under a contract entered into with the grantor after the recording of such deed. *Id.*..... 211

Metropolitan Cities. See OFFICE AND OFFICERS.

1. The general provision contained in section 172 of the

- charter of the city of Omaha, for the removal of city officers, upon charges by the district court, is not exclusive. *State v. Smith*..... 14
2. The mayor had authority to remove the commissioner of health without having made charges, and to appoint one in his place. *State v. Somers*..... 323
3. Section 172 of the act in relation to metropolitan cities requiring charges to be made before removing officers does not apply to a case where the power of removal is retained and no charges are required. *Id.*
4. By the Omaha charter the governor is authorized to remove members of the board of fire and police commissioners for official misconduct only, and, upon charges specifying the particular act or acts to be proved and an opportunity to be heard in their own defense. *State v. Smith*..... 14
5. Where the statute authorizing the appointment of a commissioner of health contains a reservation of the right of removal without preferring charges and this power is exercised by the removal of the incumbent and the appointment of another in his stead, the right of the former to the office will cease. *State v. Somers* 322

Mingled Funds. See BANKS AND BANKING.

Mischief. See MALICIOUS MISCHIEF.

Misjoinder of Parties.

Is not ground for demurrer. *Lancaster County v. Rush* 120

Moderator of School District. See SCHOOLS, 3.

Money Had and Received. See PLEADING, 2, 5.

Mortgages. See ACKNOWLEDGMENT. DEEDS, 9. HOMESTEAD. JUDICIAL SALES, 2. QUIETING TITLE, 2. SUBROGATION, 2. VENDOR AND VENDEE, 2.

1. In a foreclosure proceeding the holder of a prior mortgage is not a necessary party. *Stratton v. Reisdorph*..... 314
2. It is not essential to the validity of a notice to sell real estate, to state therein the amount of the decree. *Id.*
3. Where forgery is proven a judgment canceling the apparent lien of a mortgage is proper. *Capital National Bank v. Williams* 410
4. The fraudulent alteration of a promissory note secured by a mortgage cancels the debt which it evidenced and discharges the mortgage. *Walton Plow Co. v. Campbell*..... 174
5. In a foreclosure proceeding, where the holder of a prior

mortgage is not made a party, it is not necessary for the court to find the amount due on such mortgage. *Stratton v. Reisdorph* 314

6. Where parties have been personally served with summons and make an appearance in a suit to foreclose a mortgage, they cannot afterward, to defeat confirmation, assail the decree for a mere irregularity. *Id.*
7. A person who received an application through an agent for a loan upon real estate sent a draft for the amount of the loan, payable to the mortgagor, to his agent, and instructed him to have certain liens on the property satisfied. The agent procured the indorsement of the mortgagor on the draft and retained the same on the pretense of satisfying the liens, but instead of doing so absconded with the money without paying the claims. *Held*, That the proof failed to show a delivery of the draft to the mortgagor, and did show that the agent was intrusted with the same as agent of the lender. *Figley v. Bradshaw*..... 337
8. The loan having failed, a mortgage for commission in procuring the same was properly canceled. *Id.*
9. The note and mortgage being void, and having been transferred to a *bona fide* purchaser, judgment was properly rendered against the party making the assignment. *Id.*
10. In a foreclosure proceeding it appeared that defendant, before the execution of the mortgage, had conveyed the land by deed to one who afterwards became his wife; that the deed was duly filed for record before the mortgage was given; that the records of the county where the land was situated were destroyed by fire, and when partially restored failed to show the record of the deed; that the mortgage was executed after the wife's death, and that the wife died intestate. *Held*, That the title to the property was in the wife at the time of her death and descended, subject to the husband's right by curtesy therein, to her only daughter, and that the mortgagee was entitled to a decree of foreclosure and sale only of the life estate of the husband. *Deming v. Miles*..... 739

Motions. See AFFIDAVITS. APPEAL, 6, 9, 12. ATTACHMENT, 13. BILL OF EXCEPTIONS, 2, 6. CONTINUANCE. PLEADING, 9. PRACTICE, 1. REVIEW, 18, 26, 33.

A motion to quash a panel of jurors, verified by an attorney upon mere belief, is insufficient. *Weeping Water Electric Light Co. v. Haldeman*..... 139

Multiplicity of Suits. See EQUITY, 2.

Municipal Corporations. See ESTOPPEL, 1. METROPOLITAN CITIES. NEGLIGENCE, 1. OFFICE AND OFFICERS. TAXATION.

1. A city is not liable at common law for the negligent acts of the members of its fire department. *Gillespie v. City of Lincoln*..... 34
2. Under sec. 31, ch. 9, Gen. Stats., a city of the second class can only establish the grade of a street by ordinance. In an action for damages caused by surface water it was error to instruct the jury otherwise. *Themanson v. City of Kearney*..... 881
3. A city cannot shift responsibility for keeping its streets in a safe condition onto a contractor who has made an excavation in a public street, and thus relieve itself from liability for neglect to erect proper barriers. *City of Omaha v. Jensen* 68
4. The collection of a special assessment for the improvement of a public street will not be enjoined in a case where the pleadings and evidence show that it was substantially correct; no objection having been made until the work was completed and there being no offer to pay the amount justly due for the improvement. *Redick v. City of Omaha*.....125, 128
5. When the authorities of a city change the grade of a street, appoint appraisers to assess the damages of abutting owners, and confirm the award when returned, the city, on the trial of an appeal taken by the land-owner from the assessment of damages, cannot urge defects and irregularities in its own proceedings in changing the grade, to defeat a recovery. *Second Congregational Church Society v. City of Omaha* 103

Mutual Fire Insurance Companies. See INSURANCE, 8, 13.

Negligence. See CARRIERS, 3-5. CONTRIBUTORY NEGLIGENCE.

1. A city is not liable at common law for the negligent acts of the members of its fire department. *Gillespie v. City of Lincoln* 34
2. In an action for damages to a brick wall caused by negligence in the construction of a sewer, where there is a conflict in the evidence, the judgment of the court below will be affirmed. *Oleson v. City of Plattsmouth* 153
3. In an action for damages where injury resulted from delay a contractor was not chargeable with negligence for refusing to prosecute at night and on Sunday the work of constructing a sewer. *Id.*

4. Although a party may have negligently exposed himself to an injury, yet, if the defendant, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. *U. P. R. Co. v. Mertes*..... 204
5. A railway company is liable for damages where its engineer, in a city where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine and permits the steam to escape, whereby horses are frightened and run away, causing injury. *O. & R. V. R. Co. v. Clark*..... 867
6. There being testimony which would warrant the jury in finding a verdict against the defendant, it was properly submitted to them and the court did not err in refusing to direct a verdict. *Id.*..... 868
7. In an action against a railway company for negligently, wrongfully, and unlawfully blowing off steam from its engine, whereby plaintiff's horses were frightened and ran away, breaking his leg, it was held that the words employed implied that steam was blown off needlessly and unnecessarily, and as no objection had been made to the petition by demurrer it was sufficient after verdict. *Id.*... 867

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. LOST INSTRUMENTS. PLEADING, 13.

1. In case stated in opinion, an indorsee showed reasonable diligence in the collection of a check drawn upon a bank which closed its doors before payment thereof, and the drawers were liable to the indorsee for the amount of the check. *Nebraska National Bank of Omaha v. Logan*..... 182
2. When the signature of an illiterate person is obtained to a promissory note by the payee fraudulently inducing him to believe that he is signing an instrument of an entirely different character, without any fault or negligence of the maker, the note cannot be enforced, even in the hands of a *bona fide* holder. *Willard v. Nelson*..... 651
3. Where an officer of a bank received notes, payable to an individual member of a partnership to secure the latter's private debts, knowing that the notes belonged to the company as proceeds of a sale of the firm business and stock, the notes were properly subjected to the payment of the firm debts in a creditor's bill by the partnership creditors. *Tolerton v. McLain*..... 725
4. In an action against an indorser, where the sole issue was upon the question whether or not the words "protest waived" were written upon the notes when the defendant

delivered them to plaintiff, proof tending to show that the indorsee was unacquainted with the makers, and in effect required the defendant to guarantee the notes by making the indorsement, was sufficient to justify a verdict for plaintiff. *Mehagan v. McManus*..... 633

5. The verdict conformed to the proof in an action on drafts, where the defendant denied that he was acceptor, and testified that the signatures to the acceptance were not his, and the proof showed that the alleged acceptance had been obtained, if at all, by a stranger at a time when the defendant had signed two contracts, and two property statements for an alleged hydro-carbon burner, which the stranger professed to be about to furnish. *State Bank of Wilcox v. Wilkie*..... 579

6. In such a case in determining the good faith of the purchaser it was proper to submit to the jury evidence to show that on the night of the alleged acceptance a stranger took the alleged drafts, indorsed the same and delivered them in the night time to one Wheeler and then left the county; that at 9 A. M. next morning Wheeler took the drafts to a bank and discounted them for four-fifths of their face value; that the acceptor lived less than three miles from the bank, was solvent, and no inquiry was made about the drafts. *Id.*

New Trial. See REVIEW, 18, 33, 34.

Newspapers. See LIBEL. MANDAMUS, 7.

Non Compos Mentis. See INSANITY.

Notice. See ANIMALS, 4, 5. EQUITY, 1. INSURANCE, 7, 9, 10. JUDICIAL SALES, 2. MORTGAGES, 2.

The purchaser at a mortgage foreclosure sale is chargeable with notice of such material facts as the records disclose. *Norton v. Nebraska Loan & Trust Co*..... 466

Nuisance. See ANIMALS, 3.

Objections. See EVIDENCE, 21. REVIEW, 16, 18, 20, 23, 32. TRIAL, 4.

Failure to except to admission or exclusion of testimony is waiver of error. *Johnson v. Swayze* 117

Occupying Claimants. See EJECTMENT, 12-14.

Office and Officers. See METROPOLITAN CITIES.

1. Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing. *State v. Smith*..... 14

2. Where the incumbent is elected or appointed for a definite term, and is removable only for specified cause, the power of removal cannot be exercised until there has been preferred against him specific charges, of which he shall have notice and an opportunity to defend. *Id.*
3. Where a person is appointed to an office for a definite period and there is a provision of statute that to obtain his removal charges must be preferred against him, he cannot be removed unless such charges are made; but this rule does not apply to a case where the power of removal is retained and no charges are required. *State v. Somers*.... 323

Official Seal. See ATTACHMENT, 12.

Onus Probandi. See ATTACHMENT, 13. ELECTIONS, 4.
EVIDENCE, 20. USURY.

Opening and Closing.

Defendant is entitled to open and close where he admits plaintiff's cause of action and sets up and establishes new matter as a defense. *Suiter v. Park National Bank*..... 372

Opinion Evidence. See EVIDENCE, 15.

Order. See DECREES.

In an action by a payee against the acceptor of a conditional order for the payment of money the plaintiff must aver and prove that the conditions stipulated in the order have been fulfilled. *Stabler v. Gund*..... 648

Paramount Title. See COVENANT OF WARRANTY, 4, 6.

Parol Contract. See DEEDS, 9.

Parol Trust. See STATUTE OF FRAUDS.

Parties. See ERROR PROCEEDINGS.

In a foreclosure proceeding the holder of a prior mortgage is not a necessary party. *Stratton v. Reisdorph*..... 314

Partnership.

A chattel mortgage given to secure a partnership debt, executed by one partner with the assent of the other, is valid. *Clay v. Greenwood*..... 736

Payment.

While as between the debtor owing several debts and his creditor, where the former, at the time of payment of a sum of money, fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception to this rule, as, where the money was received by the debtor from a third party whose property would be liable

for the debt in case the money was not applied upon the third party's liability. *Crane Bros. v. Keck* 683

Personal Injuries. See DAMAGES, 1. NEGLIGENCE, 4, 5.

Plats. See TAXATION, 2.

Pleading. See APPEAL, 7, 10. DEMURRER. EJECTMENT, 6. EQUITY, 1. FOREIGN LAWS. INSURANCE, 11. JUDGMENTS, 10. LANDLORD AND TENANT, 4. MECHANICS' LIENS, 2. NEGLIGENCE, 7. ORDER. STATUTE OF FRAUDS.

1. Permission to amend is discretionary with court in actions pending in district court. *Johnson v. Swenye* 117
2. In an action in substance for money had and received, a general denial only puts in issue the receipt of the money. *Smith v. Wigton* 460
3. Every material averment in a petition, not denied by the answer, for the purposes of the action will be taken as true. *Livesey v. Brown* 112
4. A plaintiff out of possession may change his petition to quiet title so as to state a cause of action in ejectment. *Homan v. Hellman* 414
5. Where the defendant claims money as due him under a contract with the plaintiff, he must plead the fact showing his right to retain the same. *Smith v. Wigton* 460
6. Every material allegation of new matter in a pleading not denied by the answer or reply, for the purposes of the action, is to be taken as true. *Consaul v. Sheldon* 247
7. A denial in an answer of all material allegations in the petition, although faulty, will be held sufficient when assailed for the first time by motion for a new trial. *Rosenbaum v. Russell* 513
8. An answer that defendant is not indebted in the full amount claimed is not a denial of any fact on which the right to recover depends and raises no issue. *Gray v. Elbling* 279
9. An objection to a petition on the ground that an instrument on which the action is based, or a copy thereof, is not attached, should be made by motion before answer. *Cheney v. Straube* 521
10. Where an amended answer to an amended petition has been filed without making the original answer part of the second, the case stands for trial on the amended pleadings and the originals are disregarded. *Smith v. Wigton* 460
11. An error, if any, in overruling a motion to require

- plaintiff to separately state and number his two causes of action, is cured by instructing the jury that a recovery can only be had upon one. *St. Paul Fire & Marine Ins. Co. v. Gotthelf* 353
12. Damages which necessarily result from the injury complained of in an action for breach of contract may be recovered without a special statement of the same in the petition. *Kingsley v. Butlerfield*..... 230
13. A petition setting out the note upon which suit was brought, alleging that it "is long past due and no part of same has been paid," but failing to allege a waiver of demand and notice, was *held* sufficient after judgment to sustain it, as the defendant, who could avail himself of the defense, does not object. *Belcher v. Palmer*..... 449
14. The only pleadings required in an ordinary action before a justice of the peace are the bills of particulars provided by sec. 951 of the Code. Where a cause is appealed to the district court, and the answer contains new matter, the plaintiff may follow the procedure in the appellate court and reply to such new matter. *C., B. & Q. R. Co. v. Gustin*.....86, 90

Policies of Insurance. See INSURANCE.

Possession. See ATTACHMENT, 10, 14. CHATTEL MORTGAGES, 3. FORCIBLE ENTRY AND DETAINER, 2.

Powers of Attorney. See ATTORNEY AND CLIENT.

Practice. See APPEAL. ATTACHMENT, 2. 6. BILL OF EXCEPTIONS, 1, 3, 6. RECORDS, 2. REVIEW, 25.

1. A defendant who desires to submit his case to the jury on plaintiff's evidence, and asks the court to instruct the jury to find for him, should make his motion to that effect without reservation. *U. P. R. Co. v. Mertes*..... 204
2. Any error in refusing to direct a verdict against the plaintiff at the conclusion of his testimony in chief is waived by the introduction of evidence by the defense. *Id*..... 208
3. So long as the subject of the action remains substantially the same, an amendment may be permitted to adopt the relief to the facts relied upon for a recovery. *Homan & Hellman*..... 414
4. A failure to pay costs of suit in an action which has been dismissed for want of prosecution, where there is a valid excuse for non-payment, will not prevent procedure in a second action. *U. P. R. Co. v. Mertes*..... 204
5. Where the clerk of the court and deputy sheriff assist in

drawing the jury and talesmen, and are interested in the result of an action, the party complaining should bring the matter to the attention of the court before trial, otherwise the objections are waived. *Leavitt v. Sizer*..... 84

Premium Notes. See INSURANCE, 13.

Presumption. See DEEDS, 6.

Principal and Agent. See ESTOPPEL, 2. MORTGAGES, 7
REAL ESTATE BROKERS. USAGE.

Principal and Surety. See CONTRACTS, 1.

1. A surety cannot urge the default of his principal as a ground for discharge from his obligation. *Consaul v. Sheldon* 248
2. Where a statute required two or more sureties to a bond which was signed by but one, who waived additional sureties, he will be held liable. *Gray v. School District of Norfolk*..... 438
3. A surety on the bond of a contractor for the erection of a building is bound only in the manner and to the extent provided in the obligation, and if payments are made to the contractor in excess of the amounts due on estimates, he will not be liable for such excess. *Id.*
4. In an action upon a contractor's bond it was held that the making of reasonable changes in the plans of the building during the progress of the work which did not materially increase the cost beyond the contract price did not release the sureties, where the contract permitted alterations to be made. *Consaul v. Sheldon*..... 248
5. Where a liquor dealer's bond contains no provision for the payment of all damages which may be adjudged against him under the license law, no action can be maintained against the sureties thereon for damages resulting from the sale of intoxicating liquors by the principal in the bond. *Uldrick v. Gilmore*..... 288
6. Under a building contract authorizing changes in the plans, the writing of the word "glazed" thereon, indicating the kind of doors, does not invalidate the contract or release the sureties on the bond where the change was made without the knowledge or consent of the contractor. *Consaul v. Sheldon*..... 257
7. When the plans and specifications for a building are changed after the contract is signed, without the knowledge or consent of either of the parties, the same will not vitiate the contract; and where the contract authorizes alterations the sureties on the bond will not be released. *Id.*.....248, 256, 259

8. In an action on a builder's bond in case stated in opinion, it was *held* that the sureties were discharged from liability, where payments were made during the progress of the work without the consent of the sureties, and without estimates of the architect in excess of eighty-five per cent of the contract price in violation of the agreement between the contractor and owner. *Bell v. Paul*..... 240

Priority. See FORCIBLE ENTRY AND DETAINER, 2. JUDICIAL SALES, 3. MORTGAGES, 1, 5. REPLEVIN, 6.

Process. See SUMMONS.

Promissory Note. See NEGOTIABLE INSTRUMENTS, 2-4. PLEADING, 13. SUMMONS, 2.

Proof of Loss. See INSURANCE, 9.

Protest. See NEGOTIABLE INSTRUMENTS, 4.

Provocation.

- Words of provocation will not justify an assault, but may be ground of mitigation of damages. *Haman v. Omaha Horse Ry. Co* 74

Public Improvements. See MUNICIPAL CORPORATIONS.

Public Lands. See ADVERSE POSSESSION. RAILROAD COMPANIES, 2.

Purchaser. See JUDICIAL SALES, 3, 5.

Quieting Title. See BONA FIDE PURCHASERS, 3.

1. A plaintiff out of possession may amend his petition to state a cause of action in ejectment, upon payment of costs. *Homan v. Hellman*..... 414
2. Where title of a purchaser of real estate fails, at the suit of a husband and wife to quiet title to their homestead by reason of the failure of the wife to join in the conveyance to such purchaser, and it appears such purchaser, in the belief that he held title under his conveyance from the husband, had paid a mortgage that had been executed by such husband and wife, he should be subrogated to the rights of the mortgagees and decree of foreclosure should be entered in his favor. *Betts v. Sims* 840
3. A husband and wife requested a person to buy their homestead from a grantee of the husband alone, agreeing to purchase a part thereof from him as soon as they could procure funds, and the person so requested thereupon bought and took conveyance from such grantee of the husband. The husband and wife subsequently brought suit to quiet title in themselves to the same land on the

ground that it was their homestead and the former conveyance was executed by the husband only. On these facts the purchase money paid by the person so requested by the real owners to purchase from the holder of the apparent title should in equity be treated as an advancement for the plaintiffs, and defendant should be allowed to offset the amount thereof, with interest, against the plaintiff's claim for rents and waste. *Id.*

Quitclaim Deed. See **VENDOR AND VENDEE**, 1.

Quo Warranto. See **OFFICE AND OFFICERS**.

Railroad Companies. See **ADVERSE POSSESSION**, 1. **DEATH BY WRONGFUL ACT.** **EMINENT DOMAIN.** **NEGLECT**, 4-7.

Where a railroad company had earned lands granted to the state by the United States for internal improvement at the time taxes were levied thereon, and the state had, prior to the levy, parted with its title to the company, the lands were taxable although the United States did not approve the selection of the state until after the levy of taxes had been made. *Elkhorn Land & Town Lot Co. v. Dizon County* 426

Railroad Grants. See **RAILROAD COMPANIES**.

Real Estate. See **EJECTMENT.** **VENDOR AND VENDEE**.

Real Estate Brokers.

1. A real estate broker who is employed to sell or dispose of the property of his principal is entitled to recover his commission whenever he has procured a customer who is willing and able to purchase the property at the price and upon the terms named by his principal. *Siemsen v. Herman* 892
2. In an action by a real estate broker to recover commission for effecting a contract to purchase lands, where the evidence clearly showed that the customer was not able to purchase according to the terms of his agreement, the agent was not entitled to recover. *Id.*

Receivers.

1. An order by a judge apparently within his jurisdiction, appointing a receiver, which is regular on its face, is *prima facie* valid; and where money is collected by the receiver under such an order and applied in good faith to necessary repairs and to payment of taxes due upon the property therein named, such an order is a sufficient justification in an action against the receiver to recover the rents col-

- lected by him after it has been vacated for want of sufficient notice of the application. *Edce v. Strunk*..... 307
2. Such an order is a sufficient defense as to acts done in good faith in obedience to its commands; but if the receiver claim property or other rights as such, he is required to show a valid appointment. *Johnson v. Powers*, 21 Neb., 292, distinguished. *Id.*
- Recitals.** See DEEDS, 7. RECORDS, 2.
- Records.** See APPEAL, 2, 14. DEEDS.
1. In all appellate proceedings, the records of the trial court, when properly verified, import absolute verity. *Worley v. Shong*..... 311
2. The recitals of the record of a trial court are conclusive upon the parties as to the term at which a decree was rendered. If the record is incorrect, the remedy is by a proper proceeding in the trial court to correct the same. *State v. Hopewell*..... 823
- Referees.**
- Should settle and sign bills of exceptions in cases tried before them. *Carlson v. Beckman*..... 392
- Registration.** See DEEDS. TAXATION, 2.
- Is *prima facie* evidence of the delivery of deed. *Bowman v. Griffith*..... 365
- Relocation of County Seat.** See COUNTY SEAT.
- Remittitur.**
- In case stated in opinion the judgment was affirmed upon the plaintiff below filing a remittitur in the supreme court for \$1,375. *Haggin v. Haggin*..... 381
- Removal of Officers.** See METROPOLITAN CITIES. OFFICE AND OFFICERS.
- Rents and Profits.** See EJECTMENT, 16. JOINDER OF ACTIONS. LANDLORD AND TENANT, 2, 5.
- Replevin.** See ATTACHMENT, 10. SALES.
1. Upon the conceded facts and evidence referred to in opinion, the judgment is right and is affirmed. *Graham v. Carpenter*..... 782
2. When property has been delivered to plaintiff, who is the general owner thereof, if the jury find in his favor, it is unnecessary for them to assess the value. *Hanscom v. Burmood*..... 504
3. In such an action, where a verdict is returned in favor of the plaintiff, a judgment in the alternative for the return

- of the property, or in case a return cannot be had, the value thereof, is improper, but the judgment will not be reversed on that ground where it appears that the property was in plaintiff's possession when the judgment was rendered. *Id.*
4. Where a mortgagee replevies the property from the mortgagor before any conditions of the mortgage have been broken entitling the former to the possession of the same in case of the verdict in favor of the defendant in the replevin suit, the amount of the mortgage debt must not be deducted from the value of the property in determining the interest of the defendant. *Manker v. Sine*..... 749
 5. Where the evidence shows that two partners entered into a scheme to evade the payment of their creditors and transacted business in the name of their wives, a judgment in favor of the latter in an action of replevin by which goods seized on execution as property of the husbands were recovered, will be reversed. *Wedgwood v. Withers*..... 583
 6. Where, in an action of replevin by mortgagees of goods and chattels against a sheriff who had levied on the goods under a writ of attachment, a verdict is rendered in favor of the sheriff, and the value of the goods taken by the mortgagees is found to be sufficient for payment of all the liens, the judgment entered thereon will not be reversed without a showing of prejudice to the mortgagees, even though it be conceded that the lien of the mortgages was superior to that of the attaching creditors. *McDonald v. Bowman*..... 93
 7. In an action of replevin, where the property has been delivered to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for the unlawful detention. The statute requiring the judgment to be in the the alternative form is imperative. *Manker v. Sine*..... 746
 8. The judgment not being in the alternative form, the cause is remanded to the court below to render the proper judgment upon the verdict returned by the jury. *Id.*

Res Adjudicata. See EMINENT DOMAIN, 4, 5.

N. R. Co. v. Culver..... 143

Rescission. See SALES.

Revenue. See TAX LIENS. TAXATION.

Review. See AFFIDAVITS. APPEAL, 9. ATTACHMENT, 7, 9.
EJECTMENT, 3, 4. ERROR PROCEEDINGS. EVIDENCE,
2, 6, 15. INSTRUCTIONS, 3, 4. REPLEVIN, 6.

1. There is no material error in the record. *Powers v. House*, 129
2. Evidence *held* sufficient to sustain the verdict. *Mehagan v. McManus*..... 633
3. Evidence *held* sufficient to sustain the verdict. *Willard v. Nelson* 651
Lyon v. Moore..... 536
4. Upon the conceded facts and evidence the judgment is affirmed. *Graham v. Carpenter*..... 782
5. Evidence examined and, *held* not sufficient to establish a trust in parol. *Dailey v. Kinsler*..... 835
6. Evidence examined, and *held* sufficient to sustain the judgment of the trial court. *Gallagher v. Connell*..... 517
7. Evidence examined, and *held* sufficient to sustain the judgment. *McClelland v. Scroggin*..... 537
8. Where the verdict is against the weight of evidence, the judgment will be reversed. *Watson v. Coburn*..... 492
9. Evidence examined, and *held* insufficient to support the verdict of the jury. *Wedgwood v. Withers*..... 583
10. The verdict and judgment conform to the proof and are affirmed. *Weeping Water Electric Light Co. v. Haldeman*, 139
11. The evidence examined, and *held* to sustain the judgment of the district court. *Hays v. Franklin County Lumber Co*..... 511
12. Findings and judgment are right and need not be reviewed at length. *Taylor v. Kearney County*..... 381
13. A judgment will not be reversed on account of harmless error. *St. Paul Fire & Marine Ins. Co. v. Gotthelf*.... 351
14. Evidence examined, and *held* sufficient to sustain the verdict and judgment. *Id*..... 352
15. Where evidence, although conflicting, is sufficient to sustain the findings of the jury the judgment will not be reversed. *Mills v. Traver*..... 293
16. Exceptions must be taken to the giving of instructions in a civil case in order to review them in the supreme court. *Darner v. Daggett*..... 696
17. It is not prejudicial error, for which a judgment will be reversed, to admit in evidence proof of admissions of defendant's attorney, when the same admissions had been made in the answer. *Rosenbaum v. Russell*.....513, 514
18. Objections to instructions to the jury must be made in the

- motion for a new trial in order to have them reviewed by the supreme court. *Hanover Fire Insurance Co. v. Schellak*, 701
19. The testimony in an action on notes given for a harvesting machine on question of guaranty did not sustain the verdict for the defendant. *McCormick Harvesting Machine Co. v. Hartman*..... 629
20. Ordinarily objections to the admission of testimony not made when offered are waived and cannot be urged for the first time on appeal to the supreme court. *Rupert v. Penner*, 587
21. In the supreme court the presumption is in favor of the correctness of the finding of fact by the trial court, and such finding will not be reversed unless clearly wrong. *Bickel v. McAleer*..... 515
22. Where the testimony is conflicting and nearly evenly balanced, the judgment will be affirmed. *Oleson v. City of Platt mouth* 157
Budolph v. Davis 157
23. When incompetent or illegal testimony is admitted upon a trial without objection, error cannot be predicated thereon in a reviewing court. *Woh'enberg v. Melchert*.... 803
24. In an action to foreclose a mechanic's lien, where the testimony is conflicting, but where there is sufficient evidence to sustain the finding of the court, its decree will be affirmed. *Herbert v. Keck* 508
25. Judgments in causes submitted to supreme court without briefs or oral argument will ordinarily be affirmed without an investigation of the questions presented. *Stabler v. Gund* 648
26. The order of a trial court made on affidavits upon a motion to dissolve an attachment will not be reversed where there is a conflict of evidence unless the ruling is against the clear weight thereof. *Dolan v. Armstrong*..... 339
27. The allowing of a leading question is a matter within the discretion of the trial court, and a judgment will not be reversed on that ground unless there has been an abuse of discretion. *St. Paul Fire & Marine Insurance Co. v. Gott-helf* 351, 357
28. Objections to the rejection of certain testimony considered and overruled. Evidence examined, and held that the damages assessed by the jury for loss by fire are not excessive. *Hanover Fire Insurance Co. v. Schellak*..... 701
29. Where issues of fact are tried on affidavits, the supreme court will not review the order of the district court upon such evidence, unless the affidavits are identified and pre-

- served in the form of a bill of exceptions. *Fitzgerald v. Benadom* 317
30. Where a defendant under a foreclosure sale of real estate fails to object to an order of confirmation after notice of a rule to show cause why the sale should not be confirmed, he cannot have the confirmation reviewed in supreme court. *State v. Doane*..... 707
31. An assignment of error that the court erred in admitting the evidence of a witness for plaintiff, as shown by a certain page of the record furnished by the official reporter, and made a part of the bill of exceptions is sufficient for the purpose of reviewing the rulings of the trial court on the admission of the evidence on the page referred to. *Darner v. Daggett* 695
32. Where the clerk of the court and deputy sheriff are interested in the result of an action, and hence in drawing the jury and talesmen, the party complaining should make objections before the trial, otherwise they cannot be considered in the supreme court. *Leavitt v. Sizer*..... 80
33. A party is not entitled to review, on error or appeal, the decision of a trial court in denying a new trial upon the ground of newly discovered evidence, unless all the testimony given on the hearing of the motion is set out in a bill of exceptions. *Wohlenberg v. Melchert*..... 804
34. A motion for a new trial is necessary to obtain a review by petition in error of the rulings of the trial court on admission or exclusion of testimony, or to secure a review of the evidence for the purpose of determining whether it is sufficient to sustain the finding and judgment. *Miller v. Antelope County*..... 237
35. The refusing of permission to amend a pleading in an action pending in the district court rests largely in the legal discretion of the court, and unless there has been abuse of such discretion which has deprived the party of a substantial right, the supreme court will not interfere. *Johnson v. Swayze*..... 117

Running at Large. See ANIMALS, 1, 2.

Sales. See ATTACHMENT, 14. BAILMENT. JUDICIAL SALES. REAL ESTATE BROKERS. VENDOR AND VENDEE. WARRANTY.

Where an insolvent purchaser of goods makes representations as to his financial condition which he knows do not represent the true condition of his affairs, by reason of which a seller is induced to part with his goods, the transaction is

fraudulent and the seller may, upon discovering the fraud, rescind the sale and reclaim the goods. *Work v. Jacobs* 772

Satisfaction. See JUDGMENTS, 10.

School Districts.

The county superintendent has exclusive original jurisdiction in all matters pertaining to the division of counties into school districts. *Hendrichke v. Harvard High School District* 400

School Lands. See EJECTMENT, 15.

Schools. See MANDAMUS, 3, 6. SPECIAL TRIBUNAL.

1. Under sec. 3, subdivision 6, chap. 79, Comp. Stats., the rules adopted by a board of trustees must be reasonable and just. *Bourne v. State*..... 4
2. Board of trustees has power to adopt and enforce appropriate and reasonable rules and regulations for the government and management of schools under its control. *Id...* 1
3. A contract of employment of a teacher entered into on behalf of the district by the director and treasurer will bind the district, although the moderator was not consulted concerning the employment. *Montgomery v. State*, 655
4. A rule which makes it a duty of a teacher to keep a record of the standing, attendance, and deportment of each pupil, and to send a written report to his parent or guardian, requiring such parent or guardian to sign and return the same to the teacher, is a reasonable one. *Bourne v. State*..... 1

Seal. See ATTACHMENT, 12.

Secret Benevolent Societies. See BENEVOLENT SOCIETIES.

Sentence. See CRIMINAL LAW, 1.

Service. See SUMMONS.

Set-Off. See QUIETING TITLE, 3.

Sheriffs. See JUDICIAL SALES, 6, 7.

Solemnization. See MARRIAGE, 2.

Special Assessments. See MUNICIPAL CORPORATIONS, 4.

Special Legislation. See CONSTITUTIONAL LAW, 5.

Special Tribunal.

Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertain-

ing to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act. *Hendreschke v. Harvard High School District*..... 400

Specific Performance. See **VENDOR AND VENDEE**, 3, 4

Sporting. See **SUNDAY LAW**.

State Legislature. See **CONSTITUTIONAL LAW**, 3.

Statute of Frauds.

Where, in an action to set aside a certain conveyance through which the defendant claims title to lands, a court of equity has entered final decree in accordance with the prayer of the petition and quieting the title of the plaintiff, the latter may plead the statute of frauds in a subsequent action by the grantor of the defendant to establish a parol trust claimed to have been created in his favor at the time of the conveyance by him to the defendant.

Dailey v. Kinsler 835

Statute of Limitations. See **ADVERSE POSSESSION**.

N. E. Co. v. Culver 143

Statutes. See **TABLE**, *ante*, p. xlv. **CONSTITUTIONAL LAW**, 4-6. **TOWNSHIP ORGANIZATION**.

1. Repeal by implication is not favored, and a statute will not be declared so repealed unless the repugnancy between the new statute and the old one is plain and unavoidable.

Albert v. Twohig 563

2. The provision of the constitution that "no bill shall contain more than one subject, and the same shall be clearly expressed in the title," has no application to laws in force at the time of the adoption thereof. *State v. Robinson*..... 401

3. The act approved April 9, 1891, by which section 145 of ch. 12a, Comp. Stats. 1889, was amended does not take effect until the expiration of the terms of office of the two fire and police commissioners of the city of Omaha, who were appointed in May, 1889. *State v. Smith*..... 13

Statutory Bonds.

While a statutory bond must conform substantially to the requirements of the statute in respect to the penalty, conditions, form, and number of sureties, yet, where two or more sureties are required and it is signed by but one, who by his words or acts waives additional sureties, he will be held liable. *Gray v. School District of Norfolk*..... 438

Stay. See **DECREES**, 3.

Stock. See **CORPORATIONS**.

Street Railways.

In ejecting a passenger from the street car the conductor can use no more force than is necessary for that purpose, and if he do so the company will be liable. *Haman v. Omaha Street Ry. Co.*..... 74

Streets. See MUNICIPAL CORPORATIONS.

Submission of Cause. See REVIEW, 25.

Subrogation. See QUIETING TITLE, 2.

1. Where a father in good faith pays the debts of an insane son, it is probable that in a proper proceeding he may be subrogated to the rights of the creditors. *Wilkins v. Wilkins.*..... 213
2. A purchaser of real estate, having paid a mortgage thereon in the belief that he was the owner, will, on failure of his title, be subrogated to the rights of the mortgagee as against the mortgagor and others who are in equity liable for the mortgage debt. *Betts v. Sims.*..... 840

Subscription. See CORPORATIONS.

Summons. See JUDGMENTS, 8.

1. If there is any irregularity in the manner of service on the defendant of valid process, he must take advantage of such irregularity by motion or other proceeding in the court where the action is pending. *Gandy v. Jolly.*..... 712
2. Where there is no charge of collusion or fraud between the indorser and holder of a promissory note as to the liability of such indorser, and an action is brought against him in the county where he resides within the state, and service had on him there, a summons may be issued and served on the makers in other counties of the state. *Belcher v. Palmer.*..... 449
3. Where an action is instituted by attachment against an absconding debtor in the county from which he absconded, process may be served upon him in any other county of the state, and a judgment rendered on such service will be valid unless he appears and contests the right to maintain the action there. *Gandy v. Jolly.*..... 712

Sunday Law.

Playing base-ball on Sunday is sporting within the meaning of sec. 241 of the Criminal Code, and renders the persons engaging therein liable to a fine in a sum not exceeding twenty dollars, or to be confined in the county jail not exceeding twenty days, or both. *State v. O'Rourke.*..... 614

Supervisors. See COUNTY SUPERVISORS.

Surety. See **PRINCIPAL AND SURETY. STATUTORY BONDS.**

Surface Water. See **MUNICIPAL CORPORATIONS, 2.**

Tax Liens.

1. Power is conferred upon counties to foreclose tax liens by secs. 1 and 2, art. V, ch. 77, Comp. Stats. *Lancaster County v. Rush*..... 120
2. Under the statutes in force since February 15, 1877, a county treasurer is not compelled to seize and sell personal property of the taxpayer for real estate taxes before offering the realty. *Id.*..... 119
3. In an equitable proceeding to foreclose a lien for taxes the court will not consider questions which go only to the manner of assessment or levy of the tax in question or other irregularity or informality in the proceedings. *Roads v. Estabrook* 297

Tax List. See **MANDAMUS, 1.**

Tax Titles.

When the title of a purchaser for delinquent taxes shall fail he is entitled to recover in a proceeding to foreclose his lien, not only the taxes for which the property in question was sold and such as are subsequently levied, but also such as were levied for previous years and paid subsequent to date of his purchase. *Roads v. Estabrook*..... 298

Taxation. See **CONSTITUTIONAL LAW, 3, 5. MUNICIPAL CORPORATIONS, 4. RAILROAD COMPANIES.**

1. Under sec. 50, ch. 46, Rev. Stats., the county clerk had authority, where lands in his county had not been assessed, to "enter the same upon the assessment roll and assess the value." *Elkhorn Land & Town Lot Co. v. Dixon County*... 426
2. Taxes assessed against property in the city of Omaha when listed for taxation according to the description on a certain recognized plat will not be held void for the reason that the plat was never recorded. *Roads v. Estabrook*..... 298
3. In an action to foreclose the tax lien in case stated in opinion, *held* that the action of the county commissioners incorporating the town of Lincoln was not void, though unplatted lands were included, and that taxes levied by the proper city authorities upon said lands were valid. *Lancaster County v. Rush*..... 120

Teachers. See **SCHOOLS, 3.**

Telephone Communications. See **EVIDENCE, 19.**

Terms of Court. See **DISTRICT COURT, 3.**

Terms of Office. See OFFICE AND OFFICER.

Title of Act. See STATUTES, 2.

Torts. See ASSAULT. CONTRIBUTION. DEATH BY WRONGFUL ACT. FALSE IMPRISONMENT.

Townships.

1. The several statutes in relation to township organization to which appellant objects are valid and are to be construed together. Sec. 7 of the act of 1891, in reference to elections, was designed to apply to future elections and does not affect art. 4, sec. 4, ch. 18, Comp. Stats, which provides for temporary organization. *Albert v. Tookig*..... 563
2. In changing the boundaries of a township there were present seventeen members of the county board, of which eight voted in favor of the change and seven against, and two refrained from voting. It was held the duty of all present to vote, and under sec. 912 Consol. Stats., those not voting must be counted in making up the aggregate, and that as less than a majority had voted for the proposition it failed. *Township of Inavale v. Bailey*..... 453

Transcripts. See COSTS.

Trial. See APPEAL, 15. ARGUMENT OF COUNSEL. CONVERSION, 5-7. EJECTMENT, 5, 7, 9. ERROR. EVIDENCE. INSTRUCTIONS. NEGLIGENCE, 6. PLEADING, 6, 10. PRACTICE, 1, 2. REVIEW, 16, 17, 23. WITNESSES.

1. The order in which a party shall introduce his testimony rests in the discretion of the presiding judge. *Consaul v. Sheldon*..... 247
2. The admission of illegal evidence in a cause tried to a court without a jury is not sufficient ground for the reversal of the judgment. *Stabler v. Gund*..... 648
3. Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict. *Suiter v. Park National Bank*..... 372
4. An objection to the admission of a deed as incompetent, immaterial, and irrelevant, is not specific enough to reach a defect in the execution of the instrument. *Rupert v. Penner*..... 587
5. In an action on a note where the defendant admits plaintiff's cause of action, but sets up new matter, such as usury, for a defense, so that the defense would fail without proof of such new matter, he is entitled to open and close. *Suiter v. Park National Bank*..... 372
6. Where a jury after retiring returned into court, announced

that they were unable to agree, and requested the reading of a portion of defendant's testimony, it was *held* not reversible error to permit the stenographic reporter to read it to them in the presence of the attorneys for the respective parties. *Darner v. Daggett*..... 695

7. In an action upon a contract of subscription to stock of a corporation where there was testimony tending to show that defendant waived the conditions in respect to amount of stock to be subscribed before entering upon the main purpose of the corporation, it was error to direct a verdict. *Hards v. Platte Valley Improvement Co*..... 266

Trover and Conversion. See CONVERSION.

Trusts. See BANKS AND BANKING. STATUTE OF FRAUDS.

1. Only those beneficially interested in a trust estate can question the transfer of trust property by the trustee to himself. *Anderson v. South Omaha Land Co*..... 803
2. The evidence referred to in the opinion *held* to be insufficient to establish a trust in favor of plaintiff in the property in controversy. *Id.*
3. It is not the policy of the law to enforce stale claims which are asserted after the witnesses are dispersed or dead. The action discussed in the opinion is barred by the statute of limitations. *Streitz v. Hartman* 406
4. Where a trustee conveys real estate to the shareholders, and his deeds are received in full satisfaction of the trust, the grantee of a shareholder cannot open up the trust and require the trustee to account and convey to him land not included in his purchase. *Id.*

Unauthorized Appearance. See APPEARANCE.

Undertaking. See APPEAL, 11. BONDS.

Unliquidated Damages. See ATTACHMENT, 11.

Unorganized Territory. See COUNTIES.

Usage.

1. Where a principal empowers an agent to transact business with respect to which there is a well defined and publicly known usage, the presumption is, in the absence of facts indicating a different intent, that such authority was conferred in contemplation of such usage, and persons dealing with such agent in good faith will not be bound by limitations upon such usual authority. *Milwaukee & Wyoming Investment Co. v. Johnston* 554
2. Such usage to bind a principal must have existed for such time, and became so widely and generally known as to

warrant the presumption that he had it in view at the time of the appointment of the agent. *Id.*..... 555

3. In an action of replevin against the purchaser of cattle sold by an agent without authority, it was error to receive evidence on the part of the defendant to prove that at the time he made the purchase it was the usage of such agents where the purchase was made, to sell cattle, in the absence of any testimony to show that the plaintiff had knowledge of such usage. *Id.*

Usury.

When usury is clearly established in the transaction, the burden of proof is on the person holding the instrument to show that he is a *bona fide* holder for value before maturity. *Suiter v. Park National Bank*..... 372

Valuable Improvements. See EJECTMENT, 12-14.

Valued Policy Act.

Is sustained. *German Insurance Co. v. Penrod* 273

Vendor and Vendee. See BONA FIDE PURCHASER. JUDICIAL SALES. SALES.

1. One who accepts a quitclaim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title. *Bowman v. Griffith*..... 362
2. Where three persons jointly purchase three lots and by agreement took the title in the name of one of the purchasers who gave his note for balance of the purchase price secured by a mortgage on the lots, and the vendor accepted the same, it was *held* that he was restricted to the security thus taken, and could not recover a deficiency judgment against the purchasers who did not sign the notes. *Reeves v. Wilcox*..... 779
3. In case of the breach of an executory contract to convey real estate where the vendor having title refuses or puts it beyond his power to convey, and no part of the consideration has been paid, the measure of damages which the vendee is entitled to recover is the value of the land at the time the contract should have been performed less the contract price. *Carver v. Taylor*..... 429
4. In such a case, where the land is of less value than the contract price, the vendee is entitled to recover nominal damages for the breach of contract. *Id.*

Verdict. See NEGLIGENCE, 6. REPLEVIN, 3. TRIAL 3, 7.

Verification.

Where a pleading is to be used as an affidavit as well as a

pleading it must be verified positively. *Weeping Water Electric Light Co. v. Haldeman*..... 142

Voluntary Assignment. See BANKS AND BANKING.

The funds of an insolvent debtor which come into the hands of the assignee are within the jurisdiction of the county court. *Wilson v. Coburn*..... 530

Votes. See COUNTY SUPERVISORS. ELECTIONS.

Waiver. See ERROR PROCEEDINGS. INSURANCE, 7-9. REVIEW, 20. STATUTORY BONDS. SUMMONS, 1.

1. Failure to except to admission or exclusion of testimony is a waiver of error. *Johnson v. Swayze*..... 117
2. The right to have the record entry of a decree corrected, is not waived by taking a stay of an order of sale. *Hoagland v. Way*..... 388
3. Where a party waives all objections for cause to the jurors called to try his case, and also his peremptory challenges, he thereby waives a challenge to the array. *Weeping Water Electric Light Co. v. Haldeman*..... 139

Warranty. See COVENANT OF WARRANTY.

1. In an action for damages for breach of warranty in the sale of a piano for \$525, where the agent misrepresented the value and quality of the instrument, a verdict for the plaintiff for \$250 was sustained by the evidence. *Lyon v. Moore*..... 636
2. In an action on notes given for a harvesting machine where the contract of sale provided that if on one day's trial the machine could not be made to do good work, and were returned at once, the money paid would be refunded, but that a continuous use of the machine would be an acceptance, and the proof showed that it had been used two years, it was held that defendant failed to show a compliance with the terms of guaranty and a verdict in his favor was against the clear weight of evidence. *McCormick Harvesting Machine Co. v. Hartman*..... 629

Weight of Evidence. See EVIDENCE. REVIEW, 8, 22.

Witnesses.

1. The court in its discretion may permit a party to ask a witness a leading question. *St. Paul Fire & Marine Insurance Co. v. Gotthelf*..351, 357
2. The extent to which a witness may be cross-examined for the purpose of showing bias is within the discretion of the trial court. *Consaul v. Sheldon*..... 248
3. A book containing correct entries made at the time goods were purchased, when properly identified, may be intro-

- duced in evidence in corroboration of a witness, and as a detailed statement of the items involved. *St. Paul Fire & Marine Insurance Co. v. Gotthelf*..... 351
4. Where a witness admitted that he had felt unfriendly toward a party to the suit at times, but disclaimed such feeling at the time of giving his testimony, it was proper to exclude answers to questions by which it was sought to show hostility three years before the trial. *Conseul v. Sheldon*..... 255
5. It is competent to show on cross-examination of a witness that he is hostile towards one of the parties, and if he deny such fact it is proper to contradict him, but the impeaching evidence must tend to show hostility at the time of trial. *Id.*.....249, 254
6. When it is sought to impeach a witness by proving that he has made statements out of court, or upon a formal trial, contradicting his testimony, the attention of the witness must be first called to the alleged statements, to the time and place of making them, and to whom made. *Hancock v. Burmood*..... 504
- Words and Phrases. See MAXIMS.**
1. "Agricultural societies." *State v. Robinson*..... 402
2. "All moneys collected." *Taylor v. Kearney County*..... 381
3. "Base-ball." *State v. O'Rourke*..... 614
4. "Caused" and "contributed to." *Uldrich v. Gilmore*.... 292
5. "General circulation." *Keen v. State*..... 676
6. "Majority vote." *Township of Inavale v. Bailey*..... 453
7. "Special assessments." *Ittner v. Robinson*..... 133
8. "Sporting." *State v. O'Rourke*..... 614
9. "Taxes." *Ittner v. Robinson*..... 133
- Writs. See SUMMONS.**

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